

Wu & Kao v Wang

2012 NY Slip Op 32920(U)

November 27, 2012

Sup Ct, New York County

Docket Number: 104625/2010

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHY W. FREED
JUSTICE OF SUPREME COURT

PRESENT:

PART 10

Justice

Index Number : 104625/2010
WU & KAO
VS.
WANG, YU QING
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 002

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

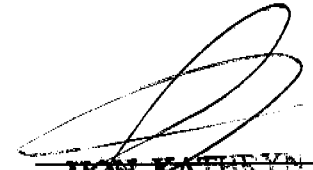
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1, 2, 3, 4, 5, 6, 7</u>
Answering Affidavits — Exhibits _____	No(s). <u>9, 10, 11</u>
Replying Affidavits <u>other - memo</u>	No(s). <u>8</u>

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

decided as follows:
 Plaintiff's motion for sum. judgment is denied
 Defendant's X-motion for sum. judgment is granted
 Complaint is dismissed
 Clerk to enter judgment accordingly - see
 attached **FILED** dated Nov. 27, 2012.

DEC 10 2012
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: Nov. 29, 2012


 HON. KATHRYN W. FREED, J.S.C.
 JUSTICE OF SUPREME COURT

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

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: IAS PART10

-----X

WU & KAO.,

Plaintiff,

DECISION/ORDER
Index No.: 104625/2010
Seq. No.: 002

-against-

YU QING WANG a/k/a HENRY WANG,

Defendant.

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

-----X

HON. KATHRYN E. FREED:

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this (these) motion(s):

FILED

DEC 10 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1,2,3..
CROSS MOTION.....	9.....
ANSWERING AFFIDAVITS.....	10.....
REPLYING AFFIDAVITS.....	11.....
EXHIBITS.....	4,5,6,7.....
OTHER.....(plaintiff's memo of law)	8.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Plaintiffs move for an Order pursuant to CPLR§3212, granting summary judgment and dismissing and/or striking defendant's Answer and three remaining Affirmative Defenses (the First, Fourth and Fifth), as set forth in defendant's Amended Answer, dated May 18, 2010. Defendant cross-moves for an Order pursuant to CPLR §3212, granting summary judgment.

After a review of the papers presented, all relevant statutes and caslaw, the Court denies plaintiffs' motion and grants defendant's cross-motion.

Factual and procedural background:

The instant action was commenced via Summons and Complaint filed April 9, 2010. Defendant filed an Amended Answer on May 27, 2010. Plaintiff law firm sues for outstanding legal fees it maintains defendant owes for past services rendered to defendant, based on causes of action sounding in breach of contract, account stated, quantum meruit and unjust enrichment. Defendant denies that he is personally liable for any of the demanded legal fees.

It is important to note that plaintiffs had previously made a motion for summary judgment on August 6, 2010, wherein they sought to have defendant's answer and affirmative defenses stricken. Defendant opposed and also cross-moved for summary judgment. In a subsequent Order dated February 11, 2011, Justice Judith Gische denied plaintiffs' motion for summary judgment. However, she dismissed all of defendant's affirmative defenses except the First Affirmative Defense, which alleges failure to state a cause of action; the Fourth Affirmative Defense, which alleges that defendant disputes the amounts billed; and the Fifth Affirmative Defense which alleges that defendant never acted in his personal capacity in the retention of plaintiff for legal services.

Justice Gische denied the previous motion based on plaintiffs' failure to "make a prima facie showing of its entitlement to the requested relief." She found that plaintiffs failed to submit any written proof to support their allegation that defendant had personally retained them, nor did they submit an acknowledgment that defendant agreed to be responsible for Amersino's debts. Additionally, Justice Gische asserted that plaintiffs only proffered one document which indicated personal knowledge of any such agreement. This particular document was an affirmation of Anne Seling, a former associate of plaintiff firm. Justice Gische noted that said affirmation was not only "unsigned," but it also contained "bald and conclusory claims" which were "unavailing." She

additionally stated that defendant's affirmation was also "wholly silent on these issues."

Justice Gische also denied defendant's summary judgment motion based on his failure to meet his prima facie burden, declaring his affidavit to be "largely conclusory." She stated that "Wang has not eliminated the possibility that he may be responsible for at least some of plaintiff's legal fees." Subsequently, at a status conference on April 5, 2012, the parties informed the court that discovery had been completed. Plaintiffs filed their Note of Issue and Certificate of Readiness on April 6, 2012. The within motions ensued thereafter.

In his affidavit in support of the instant summary judgment motion, plaintiff Wu avers that he was "personally contacted and engaged by Defendant Wang to be his personal attorney, and to represent all of his corporations, since in or about 2005." He also avers that he represented Wang in over twenty actions, both corporate and personal, over the period of 2005 through 2010. Wu references Wang's deposition wherein Wang maintains that he "personally engaged Wu & Kao as his attorneys and detailed the common practice for asking Wu & Kao to represent him or his companies on a matter."

After a review of the referenced transcript pages appended to plaintiffs' moving papers as Exhibit "F," the Court finds that plaintiff Wu mis-characterized Wang's statements. In fact, during the course of his deposition, Wang emphasized that plaintiffs were retained to handle only corporate matters and that he never contacted them in his personal capacity. Therefore, the transcript fails to support plaintiffs' assertion that they were hired to represent defendant in defendant's personal matters.

Wu also avers "I personally had several phone calls with Mr. Wang, as well as in-person meetings, both in Wu & Kao's Manhattan office, as well as our former Flushing Office, between

2005 and 2010, wherein Mr. Wang personally asked for Wu & Kao to handle certain matters and cases for him, both on behalf of his companies and on his own personal behalf." Wu further avers that "Mr. Wang, on four (4) separate occasions, personally promised to pay the legal fees owed, both on his own behalf and on behalf of his defunct company, Amersino Marketing Group, and even stated he was willing to enter into a Promissory Note for such amounts owed, which we prepared, but ultimately, he never signed. Mr. Wang specifically promised to answer secondarily for the debts of his company, Amersino, and purported to bind himself to any of Amersino's payment obligations to Wu & Kao, as Amersino was 'defunct.' "

In response to this, Wang avers that "[I] never agreed to be personal liable for the unpaid fees. I never talked with plaintiff for entering into a promissory note. There is no such conversation." (*sic*). He also argues that "[s]hareholders formed corporations to do business in corporate form in order to separate our personal liability from corporation's liability. There is no reason for me to agree to answer secondarily for the debts of corporation." (*sic*).

Plaintiff's earlier summary judgment motion was dismissed by Justice Gische based on the conclusory nature of its claims. Specifically, she noted that Wu failed to sufficiently set forth the basis of his knowledge of Wang's hiring of either Wu personally or Wu & Kao, including the specifics of how and where this allegedly all took place. While in the instant motion, Wu maintains that he was hired by defendant for both corporate and personal representation, this claim remains unsubstantiated in that no supporting physical evidence has been submitted.

In an affidavit in "Support of Motion Summary Judgment," (*sic*), Robert Mark Wasko, Esq., who is of counsel to plaintiff, avers that an inspection of the invoices sent to defendant demonstrates that several of the actions in which plaintiffs represented him were clearly personal, and not

corporate in nature. In paragraph 27(i) of his affidavit, Mr. Wasco references the case of "The Commissioners of the State Insurance Fund v. Yu Qing Wang a/k/a Henry Wang et.al." Index No. 402973/08, as an example of a personal matter in which plaintiffs represented defendant. However, a close inspection of the invoices submitted indicate that this particular index number is not the subject of the instant summons and complaint. In fact, the only invoices involving a matter before the State Insurance Fund, are under Index No. 401879/07, wherein the named defendant is Amersino Marketing Group, LLC. In his opposing affidavit, Wang asserts that he was not a party in this particular case.

In subparagraph 27(ii), Mr. Wasco goes on to state that in "In Re Zhi-Xing Hou." a Workers Compensation matter, defendant was named as the employer. However, Exhibit C appended to defendant's opposition papers, contains two documents submitted to the Workers Compensation Board in the Zhi-Xing Hou matter. The first document is entitled "Notice of Retainer and Appearance on Behalf of Employer," and the second document is entitled "Deferred Payment Agreement." In the retainer agreement, the employer is listed as "Amersino Marketing Group, LLC" followed by "Henry Wang." However, the document is signed by "Henry Wang" as "President." Under the Deferred Agreement, Amersino agrees to make payment to the claimant, and the document is signed by Yu Qing Wang, as President. Additionally, within the body of the agreement, the Workers Compensation Board states "[I]n the above referenced employer number(s), on behalf on Amersino Marketing Group, LLC..." This clearly indicates that the employer involved was Amersino, and not Wang.

It is difficult to understand how this matter could be deemed a personal one, in that it involved a controversy with Amersino, with Amersino agreeing to make payments to Zhi-Xing Hou.

Again, plaintiff has failed to submit any papers or other written documents to support its contention that the representation was solely of a personal nature.

Finally, in subparagraph 27(iii), Mr. Wasko cites "Seung Ju International Corp. v. Yu Qing Wang a/k/a Henry Wang et al." Index No. 5997/09 (Kings County Supreme), as yet another matter in which plaintiff represented defendant on a personal basis. However, an inspection of the invoices submitted in the complaint, indicates that this matter is referenced as "Seung Ju International Corp. v. Amersino Marketing Group, LLC." with the same index number. In plaintiff's Affirmation in Opposition of Cross-Motion, Donald N. Rizzuto, Esq., who appears as counsel to plaintiff, quotes Mr. Wasko's Affidavit (inaccurately), and adds that Henry Wang was named as a personal guarantor of the obligations of Amersino. However, plaintiff provides no proof of that alleged guarantee, and once again, fails to submit any documentary proof substantiating its allegations.

Moreover, Wang disputes that this was a personal matter. He asserts that it was actually entitled Seung Ju International Corp. v. Amersino Marketing Group, LLC., and was a commercial landlord/tenant action brought against Amersino for unpaid rent. It is important to note, however, that Wong does not deny that this particular matter also involved a personal guarantee on his part.

In further argument in support of plaintiffs' motion for summary judgment, in paragraph 30, Mr. Wasko references plaintiffs' Exhibit "G," which contains numerous e-mails from Anne Seelig, a former associate of plaintiff firm. Mr. Wasko argues that these e-mails confirm defendant's promise to pay the outstanding bills. He also argues that they indicate that defendant was involved in discussions with plaintiffs concerning their prospective representation of him in a personal bankruptcy proceeding. However, an inspection of these e-mails reveals that each of them was written by Anne Seelig. While these e-mails might involve Seelig's understanding of what was

discussed, they are not binding on defendant absent some indication or writing from him proving his agreement to be bound. Nor do plaintiffs submit any invoices associated with their alleged representation in said bankruptcy matter.

In his affidavit in opposition to plaintiffs' summary judgment motion and in support of defendant's cross motion, defendant notes that he first hired plaintiffs to represent himself as well as another shareholder, Ramond Zgang, in the restructuring of their company, Southeast Produce Limited (USA). Defendant also states that he only hired plaintiffs in his corporate capacity, and adamantly denies hiring them as a "personal attorney to handle my personal matters." He further asserts that he "never talked with Plaintiff for personal bankruptcy as alleged by Plaintiff for the first time in the instant litigation ..." (*sic*).

Defendant further contends that all correspondence from plaintiffs was mailed to Amersino's office address, even though it was addressed to both him and Amersino. He appends some correspondence, including several invoices, as his Exhibit "A." Defendant asserts that all legal papers were stored and maintained in Amersino's offices by its administrative employees, and that said invoices were coded by plaintiffs as "AMG" which stands for Amersino Marketing Group. Defendant asserts that even though plaintiffs possessed his home address, they never mailed any correspondence there, nor did they ever carbon copy any correspondence to him. Additionally, he asserts that he never personally paid any of plaintiffs' bills and that all payments were rendered by corporate checks. Included in his Exhibit "B," are copies of checks paid to plaintiffs, which are all clearly issued by Amersino.

Mr. Wang disputes plaintiffs' account of why it was terminated from his employ. He admits that Amersino was having financial difficulties which prompted Amersino to begin to closely

scrutinize plaintiff's bills. In doing this, Amersino discovered that the bills for legal services were "intensively containing apparently excessive charges and many significant charges for services which were not requested by Amersino" (*sic*). Mr. Wang also accused plaintiffs of "double billing," and demanded that they "explain what exact services had been actually provided." When plaintiffs failed to adequately explain said charges or produce their alleged work product relating to said charges, they were immediately fired "in or about March 2010." The Court notes that defendant also failed to produce any documentation supporting his claim that he disputed plaintiff's bills.

The drastic remedy of summary judgment should be granted only where there are no triable issues of fact (Chemical Bank v. West 195th Street Development Corp., 161 A.D.2d 218 [1st Dept. 1990]; Pearson v. Dix McBride, LLC, 63 A.D.3d 895 [2d Dept. 2009]), or where the issue is even arguable or debatable (Stone v. Goodson, 8 N.Y.2d 9 [1960]). In order to prevail on a summary judgment motion, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [1986]). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut the prima facie showing (Bethlehem Steel Corp. v. Solow, 51 N.Y.2d 870, 872 [1989]). In opposing such a motion, the party must lay bare its evidentiary proof. "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture, or speculation" (Morgan v. New York Telephone, 220 A.D.2d 728, 729 [2d Dept. 1995]; Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]).

The Court notes that both parties have indicated that discovery has been completed. Therefore, based on the aforementioned, it is clear that plaintiff firm has failed to meet its prima facie burden of demonstrating that it is owed money from defendant, and is entitled to judgment as

a matter of law.

In accordance with the foregoing, it is hereby

ORDERED that plaintiffs' motion for summary judgment is denied and it is further

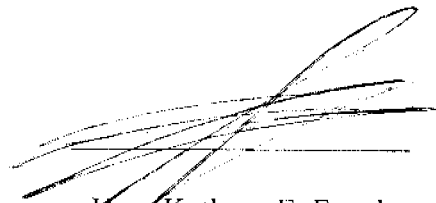
ORDERED that defendant's cross-motion for summary judgment dismissing the complaint

is granted and the complaint is hereby dismissed, it is further

ORDERED that the Clerk enter judgment accordingly.

This constitutes the decision and order of the Court.

DATED: November 27, 2013



Hon. Kathryn E. Freed
J.S.C.

FILED
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