

**Brunelle & Hadjikow, P.C. v O'Callaghan**

2013 NY Slip Op 31302(U)

June 17, 2013

Sup Ct, NY County

Docket Number: 158213/2012

Judge: Shirley Werner Kornreich

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

*Justice*

Index Number : 158213/2012  
BRUNELLE & HADJIKOW, P.C.  
vs  
O'CALLAGHAN, JAMES G.  
Sequence Number : 002  
SUMMARY JUDGEMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 6/4/13  
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) 36-55, 57  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s) 65, 70  
Replying Affidavits \_\_\_\_\_ | No(s) \_\_\_\_\_

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

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

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

Dated: [Signature]

**SHIRLEY WERNER KORNREICH**  
J.S.C.  
[Signature] 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 54

-----X  
BRUNELLE & HADJIKOW, P.C.,

Index No.: 158213/2012

**DECISION & ORDER**

Plaintiff,

-against-

JAMES G. O'CALLAGHAN,

Defendant.

-----X  
SHIRLEY WERNER KORNREICH, J.:

In this action to collect legal fees, plaintiff Brunelle & Hadjikow, P.C. (B&H) moves for summary judgment against defendant James G. O'Callaghan pursuant to CPLR 3212. Plaintiff's motion is granted for the reasons that follow.<sup>1</sup>

*I. Procedural History & Factual Background*

B&H is a law firm that represents clients in disputes with securities regulators. On April 8, 2003, B&H and O'Callaghan entered into a Retainer Agreement (the Retainer), whereby B&H agreed to represent O'Callaghan in a number of regulatory proceedings before the New York Stock Exchange (the NYSE). The Retainer provides that "[i]nvoices not objected to in writing within 30 days of issuance shall be considered accepted and agreed to by [O'Callaghan]" and that "[o]n any amounts unpaid for more than 30 days after billing, interest shall accrue and become payable at the rate of 1.5% per month." Between April 2003 and December 2006, B&H performed extensive legal work for O'Callaghan, for which the net billings totaled \$626,276.13. Of that amount, O'Callaghan paid \$468,613.67 to B&H.

<sup>1</sup> This motion is decided on the papers without oral arguments.

On November 21, 2012, B&H commenced this action to collect the remaining \$157,662.46 based on causes of action for breach of contract and accounts stated. O'Callaghan, who has appeared *pro se*, set forth defenses based on improper calculation of his legal bills and legal malpractice (which also was pled as a counterclaim). In an order dated April 16, 2013, this court granted B&H's motion to dismiss "all affirmative defenses and counterclaims alleging malpractice."<sup>2</sup> B&H now moves for summary judgment to collect the \$157,662.46 based on the invoices it sent to O'Callaghan.

Over the course of B&H's representation, the parties had numerous disputes regarding O'Callaghan's failure to timely make payment within 30 days in accordance with the terms of the Retainer. Those disputes were resolved pursuant to a letter signed by O'Callaghan, dated June 7, 2006 (the June 7 Bill), in which O'Callaghan acknowledged that he owed B&H a total amount of \$146,670.47, which included the \$75,000 that the parties agreed would be the amount due for work performed on an appeal before the NYSE. Subsequently, O'Callaghan made various payments to B&H totaling \$87,345.40, leaving a balance of \$59,325.07 on the June 7 Bill.

B&H continued to perform legal work for O'Callaghan through November 2006. In a letter dated November 22, 2006, O'Callaghan terminated B&H's representation. B&H in a letter dated November 28, 2006, agreed to facilitate the transition of O'Callaghan's pending matters to his new counsel and reminded him of his outstanding legal bills. In a letter dated December 14,

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<sup>2</sup> On that motion, B&H also sought summary judgment on its account stated claim, but did not submit all of the relevant invoices. B&H was given leave to withdraw and renew its summary judgment motion. *See* 4/16/13 Transcript (NYSCEF Doc. No. 34). B&H has properly submitted all of the invoices on this motion.

2006, B&H sent O'Callaghan invoices reflecting his 2006 bills, including a summary of billed amounts, credits, payments, and total balance as of various dates in 2006. The final balance, as of December 6, 2006, was \$157,569.46. This amount included the payments made after the June 7 Bill.<sup>3</sup> In a letter dated December 27, 2006, O'Callaghan objected to the December 6 invoice on the grounds that he was improperly charged more than the agreed upon \$75,000 amount for his NYSE appeal and that B&H improperly raised its hourly rate. In a letter dated January 11, 2007, B&H replied to O'Callaghan, noting that: (1) though B&H had billed \$143,406.25 on the NYSE appeal, B&H had given O'Callaghan over \$68,400 in credits on his invoice, reducing the net amount billed on the appeal to \$75,000; and (2) the disputed rate increases were charged in prior invoices without timely objection from O'Callaghan. Moreover, the Retainer permitted B&H to increase its rates "from time to time", and O'Callaghan did not object to the increases with 30 days of each invoice pursuant to the Retainer. Additionally, some of the rate increases occurred before the June 7 Bill, which, B&H avers, precludes O'Callaghan's objection. Finally, on this motion, B&H waived its right under the Retainer to collect the 1.5% interest per month on O'Callaghan's balance. Instead, B&H merely seeks the lower statutory rate of 9% per year.

## II. Discussion

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is on the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima*

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<sup>3</sup> The total amount sought by B&H, \$157,662.46, includes an additional \$93 disbursement made in December 2006.

*facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

“[A]n 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 the balance due. By retaining billing statements and failing to object to the account within a reasonable time, the recipient of the bill implies that he or she agrees with the sender regarding the amount owed.” *Stephan B. Gleich & Assocs. v Gritsipis*, 87 AD3d 216, 223 (2d Dept 2011) (internal citations omitted). To establish a *prima facie* case for an account stated for the collection of attorneys' fees, the plaintiff must submit invoices that set forth the “hourly rate, the billable hours expended, or the particular services rendered.” *Ween v Dow*, 35 AD3d 58, 62 (1st Dept 2006).

There is no doubt that B&H is entitled to an account stated on all amounts included in the June 7 Bill. O'Callaghan's written acknowledgment that he owed those amounts precludes his current objections as to how they were calculated, such as his qualms about rate increases. As

for O'Callaghan's objections to the amounts billed after June 7, 2006, which were made for the first time in his December 27, 2006 letter, he is precluded from objecting to virtually all of the amounts billed because his objections were not made within 30 days of the relevant monthly invoices (except for his objections to invoices sent after November 27, 2006). Nonetheless, even if he were entitled to challenge all of the invoices sent after the June 7 Bill, his objections would still fail. First, his objection to the rate increases, provided for in the Retainer, occurred long after such increases went into effect and were billed. Second, his objection to being over-charged for the NYSE appeal fails because the invoices clearly evidence the credits that lowered the appeal billings to \$75,000. His self-serving contention about B&H billing him more than \$75,000 for work on the appeal (they purportedly billed it as work for his other NYSE proceedings) is refuted by the invoices and is insufficient to defeat summary judgment.

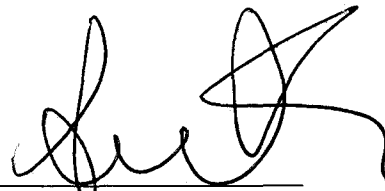
Next, O'Callaghan's contention that this action is time-barred is incorrect. Pursuant to CPLR 213(2), the statute of limitations on claims for breach of contract and accounts stated is six years "and it accrues on the date of the last transaction in the account." *Elie Int'l, Inc. v Macys West Inc.*, 106 AD3d 442 (1st Dept 2013). This action was commenced on November 21, 2012, less than six years since the termination of B&H's representation (November 22, 2006) and the date of the last invoice (December 14, 2006).

Finally, it is not clear why O'Callaghan objects to B&H's election to merely obtain statutory pre-judgment interest in lieu of the substantially higher amount to which it is contractually entitled (over 6 years, 1.5% interest per month is much higher than 9% interest per year). Therefore, B&H is granted summary judgment on the \$157,662.46 plus 9% simple annual interest from January 14, 2007 (30 days after the last invoice). Accordingly, it is

ORDERED that the motion by plaintiff Brunelle & Hadjikow, P.C. for summary judgment against defendant James G. O'Callaghan is granted, and the Clerk is directed to enter judgment in favor of said plaintiff and against said defendant in the amount of \$157,662.46 plus 9% simple annual interest from January 14, 2007 until the date judgment is entered; and it is further

ORDERED that within 7 days of the entry of this order of the NYSCEF system, plaintiff Brunelle & Hadjikow, P.C. must serve a copy of this order with notice of entry upon defendant James G. O'Callaghan by first class mail.

Dated: June 17, 2013

ENTER:   
\_\_\_\_\_  
J.S.C.