Jaffe Ross & Light, LLP v Mann
2013 NY Slip Op 32212(U)
September 16, 2013
Supreme Court, New York County
Docket Number: 158984/2012
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. Justice PART _____

Index Number : 158984/2012
JAFFE ROSS & LIGHT, LLP
vs
MANN, EZRA
Sequence Number : 002
REARGUE / RECONSIDER

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

is decided in accordance with the annexed decision.

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

Dated: 9/16/13

CK
_____, J.S.C.
CYNTHIA S. KERN
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 55

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JAFFE ROSS & LIGHT, LLP,

Plaintiff,

Index No. 158984/2012

-against-

DECISION/ORDER

EZRA MANN,

Defendant.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action to recover allegedly outstanding legal fees in connection with its representation of defendant in two separate lawsuits. By order dated May 9, 2013, this court denied plaintiff's motion and defendant's cross-motion for summary judgment. Defendant now moves pursuant to CPLR § 2221 for an order granting reargument of his cross-motion and upon reargument, granting him summary judgment and dismissing this action in its entirety. For the reasons set forth below, defendant's motion for reargument is granted and, upon reargument, defendant's cross-motion for summary judgment is granted in part and denied in part.

The relevant facts are as follows. On or about June 1, 2006, defendant Ezra Mann

("Mann") retained plaintiff pursuant to a Retainer Agreement (the "Retainer Agreement") in connection with a lawsuit entitled *Kaygreen Realty Co. LLC v. Belmont Furniture, Inc.*. Pursuant to the Retainer Agreement, plaintiff represented Mann as an individual and not the corporate entity. Thereafter, plaintiff alleges that defendant and it entered into two oral agreements for plaintiff to represent defendant in two other actions. The first was entitled *Kaygreen Realty Co., LLC v. Ezra Mann* (the "Queens Action") and was related to the action in the Retainer Agreement. The second action was completely unrelated and was entitled, *Furniture World of Jerome Avenue, Inc. v. Luna Bros. Realty Corp.* (the "Bronx Action"). It is undisputed that no retainer agreement was ever made between the parties for the Bronx Action.

Plaintiff allegedly performed legal services, advanced costs and incurred expenses on behalf of Mann pursuant to the oral agreements from June 1, 2006 through October 7, 2011. Specifically, plaintiff alleges in its complaint that Mann owes it $21,107.54 for its work on the Queens Action and $27,523.90 for its work on the Bronx Action.

On or about December 6, 2012, plaintiff brought the instant action to collect the allegedly outstanding fees. Thereafter, plaintiff moved for summary judgment on the ground that defendant failed to sufficiently object to the itemized invoices annexed to its verified complaint. Defendant cross-moved for summary judgment dismissing the action on the ground he was not served properly as he, an Orthodox Jew, was served on the Sabbath. Additionally, defendant argued that plaintiff's motion should be denied as he had already paid plaintiff for its work in relation to the Queens Action, the corporate defendant, not Mann, was the client in the Bronx Action and that plaintiff agreed to take the Bronx Action on a contingency basis.

By order dated May 9, 2013, this court denied both motions (the "May Decision"). As an

initial matter, this court found that service of process on defendant was not defective. Additionally, in denying plaintiff's motion for summary judgment, this court held that plaintiff was not entitled to summary judgment pursuant to CPLR § 3016 as defendant had asserted a defense for non-payment that went to the entirety of the parties' dealings and as such was not required to set forth specific denials to plaintiff's invoices in his answer.

Defendant now moves to reargue this court's May Decision on the ground that this court overlooked the portion of defendant's motion seeking summary judgment on the basis that any agreement with plaintiff for the Bronx Action was with the corporation, not Mann individually.

On a motion for leave to reargue, the movant must allege that the court overlooked or misapprehended matters of fact or law. CPLR § 2221(d)(2). Here, defendant alleges that the court overlooked the portion of his cross-motion seeking summary judgment on the ground that plaintiff's agreement to provide legal services for the Bronx Action was with Furniture World of Jerome Avenue, Inc., not defendant. As the court only discussed this issue in relation to defendant's opposition to plaintiff's motion for summary judgment in its prior decision, reargument is granted. Upon reargument, the court reverses its prior determination and for the reasons set forth below, defendant's motion for summary judgment is granted in part and denied in part.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he

rests his claim." *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

In the present case, as an initial matter, defendant has failed to demonstrate his entitlement to summary judgment as a matter of law dismissing plaintiff's complaint as it pertains to the Queens Action. Defendant's only arguments in support of the motion to dismiss in relation to the Queens action is that he already paid plaintiff in full for the Queens Action and plaintiff misapplied those payments to the fees incurred in the Bronx Action. However, defendant fails to present sufficient evidence on this motion for the court to ascertain whether any payments were indeed misapplied by plaintiff. Accordingly, as defendant concedes that he agreed to be responsible for the payment of the fees in the Queens Action and has failed to demonstrate that those fees have been paid in full, summary judgment is not warranted as there remains a disputed material issue of fact as to whether defendant has fully paid plaintiff for the legal fees stemming from the Queens Action.

However, unlike the Queens Action, defendant has established that plaintiff cannot recover against him individually as a matter of law for any fees stemming from the Bronx Action. Pursuant to 22 NYCRR § 1215.1, "an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement [or enter into a written retainer agreement] before commencing the representation, or within a reasonable time thereafter." An attorney's failure to comply with the requirements of 22 NYCRR § 1215.1, precludes him from recovering any unpaid legal fees under breach of contract. *See, e.g., Seth Rubinstein, P.C. v. Ganea*, 41 A.D.3d 54 (2nd Dept 2007). However, an attorney's "failure to comply with the letter of engagement rule does not preclude it

from seeking recovery of legal fees under such theories as services rendered, quantum meruit, and account stated." *Roth Law Firm, PLLC v. Sands*, 82 A.D.3d 675, 676 (1st Dept 2011); *see also Nabi v. Sells*, 70 A.D.3d 252 (1st Dept 2009).

In order to recover under these alternative theories, though, an attorney must first establish some sort of privity between him and the defendant. For example, in order to recover in quantum meruit, the attorney has the burden of establishing, among other things "the performance of services in good faith, acceptance of the services by the person to whom they are rendered, and expectation of compensation therefor." *Feedman v. Pearlman*, 271 A.D.2d 301, 304 (1st Dept 2000); *see also Rowley, Forrest, O'Donnell & Beaumont, P.C. v. Beechnut Nutrition Corp.*, 55 A.D.3d 982, 983 (3rd Dept 2008). Additionally, "[a]n account stated is an agreement between the parties to an account based upon prior transactions *between them*." *Shea & Gould v. Burr*, 194 A.D.2d 369, 370 (1st Dept 1993) (emphasis added).

Here, as an initial matter, plaintiff cannot maintain a claim against defendant for breach of contract as it is undisputed that the parties never entered into a written retainer agreement for the Bronx Action. While plaintiff frames its claim against defendant as one for breach of contract, it concedes that it never entered into a written retainer agreement with defendant for the Bronx Action. Accordingly, plaintiff cannot maintain a breach of contract claim against defendant for the Bronx Action as a matter of law.

Additionally, plaintiff cannot maintain a claim against defendant under quantum meruit as its services in the Bronx Action were not rendered for defendant but were rendered for and accepted by the corporation. It is undisputed that defendant was not a named party in the Bronx Acton but that the lawsuit was brought on behalf of the corporation. Accordingly, to the extent

that any services were rendered, they were rendered on behalf of and accepted by the corporation. As such, plaintiff could have no expectation of compensation from defendant for its legal fees. To the extent that defendant argues that plaintiff orally agreed to be individually responsible for the payment of the fees, that argument is barred by the statute of frauds. *See* General Obligations Law § 5-701.

Additionally, plaintiff cannot establish a valid account stated against defendant for the Bronx Action as the invoices are addressed to him as a corporate officer only. The invoices annexed to plaintiff's complaint pertaining to the Bronx Action are addressed as follows: "Mr. Ezra Mann c/o Furniture Zone." This is insufficient to have an account stated claim against defendant as the fact that they were sent "c/o Furniture Zone" demonstrates that they were addressed to him as a corporate officer, rather than as an individual who may have agreed to be personally responsible for the legal fees. *See Roth Law Firm*, 82 A.D.3d at 676.

Based on the foregoing, upon reargument, defendant's motion for summary judgment is granted to the extent that plaintiff's claim against defendant for any outstanding legal fees incurred in the Bronx Action is hereby dismissed. This constitutes the decision and order of the court.

Dated: 9/16/13

Enter: _____

J.S.C.

CYNTHIA S. KERN
J.S.C.