SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35
Justice

Index Number : 652581/2012
WILK AUSLANDER LLP
vs.
WESTPARK CAPITAL, INC.
SEQUENCE NUMBER : 002
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE 8/16/13
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). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of defendants' motion to dismiss the Amended Complaint as to Richard Rappaport and Anthony Pintsopoulos for lack of personal jurisdiction, *forum non conveniens*, and under California's Mandatory Fee Arbitration Act, California Business and Professions Code, Section 6200, *et seq* is granted solely on the ground of lack of personal jurisdiction, and the Amended Complaint is severed and dismissed against Richard Rappaport and Anthony Pintsopoulos; and it is further

ORDERED that the branch of defendants' motion to dismiss the Amended Complaint as to all defendants for failure to state a claim is granted solely to the extent that the *quantum meruit* claim as against WestPark Capital, Inc. is severed and dismissed for failure to state a claim; and it is further

ORDERED that defendant WestPark Capital, Inc. shall serve its Answer to the Amended Complaint within 30 days of service of a copy of this order with notice of entry; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the Decision and Order of the Court.

Dated: 10 · 10 · 2013

_____, J.S.C.
HON. CAROL EDMEAD

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: PART 35

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WILK AUSLANDER LLP,

Plaintiff,

-against-

WESTPARK CAPITAL, INC., RICHARD RAPPAPORT, and ANTHONY PINTSOPOULOS,

Defendants.

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Index No. 652581/2012
Motion Sequence No. 002

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

MEMORANDUM DECISION

In this action to recover legal fees allegedly due and owing, defendants WestPark Capital, Inc. ("WestPark"), Richard Rappaport ("Rappaport"), and Anthony Pintsopoulos ("Pintsopoulos") move to (1) dismiss this action pursuant to CPLR 302, 327, 3211(a)(7), and 3211(a)(8); and (2) dismiss the action under California's Mandatory Fee Arbitration Act, California Business and Professions Code, Section 6200, *et seq*.

Factual Background

Plaintiff, a New York law firm, alleges that defendants engaged plaintiff to provide legal services related to three class action securities actions: *In Re China Intellligent Lighting and Electronics, Inc. Securities Litigation* (pending in California); *Scott v ZST Digital Networks, Inc. et al.* (pending in California); and *Schuler v NIVS IntelliMedia Technology Group, Inc., et al.,* (pending in New York) (the "New York matter"). WestPark is an investment bank and securities brokerage firm located in California. Rappaport is WestPark's Chief Executive Officer and resides in California. Pintsopoulos is WestPark's former President and Chief Financial Officer and resides in Florida.

According to plaintiff, it entered into a written Engagement Agreement with WestPark dated May 12, 2011, wherein plaintiff agreed to provide legal services to defendants, and WestPark agreed to pay plaintiff, *inter alia*, hourly rates and expenses. Plaintiff also represented other parties, one with whom WestPark agreed to share in plaintiff's legal fees. Further, "upon information and belief," the individual defendants agreed with WestPark to be responsible for plaintiff's legal fees. Plaintiff allegedly performed services for defendants until it was granted leave to withdraw as counsel in May 2012. Plaintiff alleges that defendants accepted plaintiff's services, were sent monthly invoices (from June 2011 through June 2012) for the work performed, and only made partial payments throughout that billing period, leaving a balance due and owing. As a result, plaintiff alleges claims for breach of contract, account stated, and *quantum meruit* against WestPark, and *quantum meruit* as against Rappaport and Pintsopoulos.

Thereafter, defendants filed a legal malpractice and overbilling action in California against plaintiff and other attorneys at the law firm. In that action, defendants claim that they instructed plaintiff to not do any work on the three matters unless it was strictly necessary. Instead, plaintiff performed needless and premature discovery-related work, failed to advise defendants that the Private Securities Litigation Reform Act of 1995 requires an automatic stay of discovery until it was shown that the securities complaint sufficiently pleaded a proper claim.

Defendants now move to dismiss this action against (I) Pintsopoulos and Rappaport for lack of personal jurisdiction, *forum non conveniens*, and under California's Mandatory Fee Arbitration Act, California Business and Professions Code, Section 6200, *et seq*. (the "Act"), and (ii) all defendants, for failure to state a claim.

Defendants argue that the Amended Complaint does not allege any jurisdictional facts,

and that Rappaport and Pintsopoulos are residents of California and Florida, respectively. Plaintiff only represented them in the *China Intelligent Lighting* action pending in California, as they are not named in the other two actions. Neither of them has entered into any contract with plaintiff or transacted any business in New York. At most, they received legal services in their home state in a California action by attorneys admitted *pro hac vice* in a federal district court in California.

Defendants also contend that the Amended Complaint should be dismissed for *forum non conveniens*. It is burdensome for New York courts to hear a California-centered dispute that arose out of legal services rendered in an action pending in California. Rappaport and Pintsopoulos can be sued in California, and California law applies to the dispute and potential counterclaims, which the California court is better suited to adjudicate. There would be a severe hardship on Rappaport and Pintsopoulos to litigate this action in New York. And, that plaintiff is a New York resident is not a reason to deny a *forum non conveniens* motion, especially since it obtained *pro hac vice* admission in California.

In support of dismissal for failure to state a cause of action, defendants argue that plaintiff's mere allegation that it performed under the agreement, is insufficient to support a breach of contract claim. Plaintiff failed to allege (and cannot allege) that it performed its services "adequately" without overbilling WestPark for unauthorized, needless work. The account stated claim also fails because WestPark and Rappaport objected orally, and in writing on May 21, 2012, June 25, 2012 and July 23, 2012 to the statement of account on at least two occasions. WestPark's general counsel wrote to a partner of plaintiff, Jay Auslander ("Auslander") complaining of overbilling and inadequate and deficient legal services. And, the

quantum meruit claim is unavailable to plainitff since there is a valid written agreement that governs the parties' dispute. Moreover, under the applicable California law, the *quantum meruit* claim against Rappaport and Pintsopoulos fails because as shown by the invoices and imprecise time records, they did not agree to compensate plaintiff and plaintiff failed to plead (and cannot show) that it expected to be compensated by either of them individually. All of the time spent working on the three claims is billed to WestPark and the invoices are not directed to Rappaport and Pintsopoulos individually. Further, plaintiff failed to allege the reasonable value of its services rendered to them individually. As Rappaport and Pintsopoulos were not defendants in two of the three cases, there is no basis to hold them jointly and severally liable for the legal fees sought.

Further, plaintiff's failure to give Rappaport and Pintsopoulos written notice of their right to arbitrate the dispute prior to the service of any summons or claim or filing of an action against them as required under the Act §6201(a) is a ground to dismiss this action. And, Rappaport and Pintsopoulos hereby request arbitration, which triggers an automatic stay of this action, subject to vacatur only after a hearing. Rappaport and Pintsopoulos have not waived their rights to arbitration under the Act by filing the malpractice action in California because they were not given notice of their rights, are only seeking a declaratory judgment that California law applies to them, and any evidence of malpractice will only be admissible to the extent those claims bear upon the fees to which plaintiff is entitled.

In opposition, plaintiff argues that the Court has personal jurisdiction over the individual defendants pursuant to the Long Arm statute, CPLR 302(a). According to one of plaintiff's members, Natalie Shkolnik, plaintiff never heard of WestPark until Rappaport and Pintsopoulos

contacted plaintiff in New York to request that plaintiff provide legal services to defendants in the class action matters in which they were named as parties. Emails demonstrate that Rappaport and Pintsopoulos assisted plaintiff in its representation of WestPark in connection with the New York matter. None of the attorneys who handled the three matters ever traveled to California in connection with representing defendants. Pintsopoulos sent plaintiff numerous emails to plaintiff concerning the successful dismissal of the actions against defendants. Rappaport and Pintsopoulos regularly communicated with plaintiff concerning WestPark's payment of the invoices. Further, "upon information and belief," Rappaport and Pintsopoulos agreed with WestPark to be responsible for a share of WestPark's legal fees, and thus, are in privity with WestPark.

Plaintiff also argues that New York is the proper forum, given that the facts alleged in the Amended Complaint occurred in New York, New York law applies to disputed facts, and this Court will not be overburdened by this dispute. All of the witnesses and documents are located in New York, where plaintiff's legal services were solicited and performed, and from where plaintiff communicated and billed. Rappaport and Pintsopoulos failed to show hardship, and California is not necessarily an alternative forum to Pintsopoulos who resides in Florida.

Plaintiff also argues that it sufficiently alleged a breach of contract claim against WestPark, by detailing the successful defense of the defendants in three matters. And, the account stated claim is sufficiently stated against WestPark based on WestPark's failure to object to the 39 invoices sent, partial payments by WestPark, and assurances of future payments. WestPark did not object to the invoices until plaintiff warned of this action, and such objections are untimely to defeat an account stated claim. And, New York law permits plaintiff to plead a

quantum meruit claim in the alternative to a breach of contract claim, especially where defendants dispute the scope of the contract and argue that plaintiff overbilled for unnecessary work not authorized by the Engagement Agreement. Raising factual disputes cannot support a dismissal pursuant to CPLR 3211. The account stated claim is sufficiently alleged against all defendants under controlling California law, which does not require a claim of expectation of payment by defendants. The caselaw defendants cite is of questionable authority and is factually distinguishable. And, plaintiff does not seek the entire amount from the individual defendants.

Furthermore, the individual defendants waived their rights under the Act by filing a malpractice suit for affirmative relief against plaintiff. And, that Rappaport and Pintsopoulos have since withdrawn such claim against plaintiff does not cure their waiver of their rights to arbitration, where there is no stipulation to set aside such waiver, as required.

In reply, defendants add that plaintiff's representation of WestPark in a completely separate action does not support personal jurisdiction over the individual defendants, and the individual defendants' alleged contacts with plaintiff pertained to the California matters. Receiving legal services in another state is not a contact with the state of New York for the purpose of jurisdictional analysis. And, defendants contend that plaintiff solicited *them*. Gregory Dow ("Dow"), the General Counsel of Rodman & Renshaw LLC ("Rodman LLC") (one of WestPark's co-defendants in several federal class actions), called Rappaport on May 4, 2011 informing him that he was being represented by plaintiff herein, and that plaintiff would be calling Rappaport to follow up (Aff., ¶3).[1] The next day, May 5th, Auslander called Rappaport

[1] A screen shot of Rappaport's computerized task list shows the message left that " . . . You are invited to also be represented by [plaintiff] if you wish to do so and split the fees. Jay [Auslander of plaintiff] will be calling [] you shortly." (Exh. B)

and left a message.[2] While Rappaport may have returned the call, Auslander initiated the contact, and followed up again and left another message.[3] When they finally spoke with each other on May 5th (while Rappaport was in California), Auslander "pitched" his firm. Natalie Shkolnik of plaintiff's firm, did not contact Rappaport until November 2011, and as such, played no role in or have knowledge of the facts regarding securing WestPark as a client.

Defendants also add that all of the legal work performed by plaintiff, including the alleged "needless" discovery, falls under the scope of the Engagement Agreement which concerns the three underlying matters. There is no claim that the scope of the services falls outside of such Agreement. And, California law applies to the *quantum meruit* claim against Rappaport and Pintsopoulos, given that all of plaintiff's calls, invoices, and emails were sent or made to California and no agreement with, or invoices or payments were generated in New York with Rappaport and Pintsopoulos. Further, under California law, the *quantum meruit* claim against Rappaport and Pintsopoulos fails if payment was expected from a third party.

Defendants insist that New York is not the proper forum, as the representation of Rappaport and Pintsopoulos and filing of motion papers on their behalf, occurred in a California action, and the failure to pay took place in California where WestPark maintains its offices and bank accounts.

And, defendants did not waive their rights to arbitration. A waiver must be knowing, and notice of such right to arbitrate is a precondition to a knowing waiver.

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[2] A screen shot of Rappaport's computerized task list shows a message that Auslander called and would be in his office "until 6pm EST" and that his number was added to Rappaport's contacts.

[3] A screen shot of Rappaport's task list indicates that Auslander "will call you after his conf. call . . . ."

In response, plaintiff requests the Court to strike Rappaport's affidavit, which contains inflammatory allegations[4] and facts which cannot be considered on a pre-Answer motion to dismiss or considered for the first time in reply. Otherwise, plaintiff requests the Court to consider its sur-reply which addresses the new issues raised by defendants. In such sur-reply, plaintiff contends that on May 3rd, one day before Dow's call, Rappaport *emailed Dow* suggesting to "coordinate together on our defense" after being served in the underlying matters. Therefore, Rappaport sought joint representation with Rodman. Once plaintiff confirmed that there was no conflict in jointly representing Rodman and WestPark, Auslander agreed to speak to Rappaport about engaging plaintiff as counsel. Plaintiff's bills were then divided between Rodman (60%) and WestPark (40%), as agreed.

In reply, defendants oppose consideration of plaintiff's sur-reply, and argues that the fee-sharing agreement was in no way limited to representation by plaintiff, and nothing in plaintiff's exhibits shows that Rappaport ever heard of plaintiff or Auslander. Instead, such exhibits show that Rappaport did not seek out plaintiff but allowed plaintiff to pitch the law firm after consulting with Dow. Plaintiff is not permitted to have the last word, and its sur-reply should be stricken.[5]

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[4] The "test under statute providing for striking of any scandalous or prejudicial matter unnecessarily inserted in pleading is whether allegation is relevant, in evidentiary sense, to the controversy and, therefore, admissible at trial" (*Wegman v. Dairylea Co-op., Inc.*, 50 AD2d 108, 376 NYS2d 728 [4th Dept 1975], *appeal dismissed* 38 NY2d 710, 382 NYS2d 1030, 346 NE2d 829, appeal dismissed 38 NY2d 918, 382 NYS2d 979, 346 NE2d 817). The Court rejects plaintiff's letter request to strike the purported inflammatory material found in Rappaport's affidavit, in which he criticizes plaintiff's legal work. Such statements challenging the quality and nature of plaintiff's legal services as unnecessary and performed to pad defendant's billing invoices are material to plaintiff's claims for unpaid fees against defendants.

[5] The Court considers both sur-replies by the parties since each party availed itself of the opportunity to oppose the other's claims and consideration of all arguments does not result in prejudice to any party (*Fiore v Oakwood Plaza Shopping Center, Inc.*, 164 AD2d 737, 739 [1st Dept], *affd*, 78 NY2d 572 [1991], *cert denied*, 506 US 823 [1992]).

Discussion

As to dismissal for lack of personal jurisdiction pursuant to CPLR 3211(a)(8), where a defendant who is not New York resident moves to dismiss on this ground, the burden rests on plaintiff, "as the part[y] asserting jurisdiction" to prove that New York's long-arm statute confers jurisdiction (*Copp v Ramirez,* 62 AD3d 23, 28, 874 NYS2d 52 [1st Dept 2009]). Once a determination is made that the New York's long-arm statute confers jurisdiction over a defendant, the Court must determine whether the exercise of jurisdiction comports with due process *(LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]).

As relevant herein, under CPLR 302(a)(1), a court may exercise jurisdiction over a non-domiciliary who, in person, or through an agent, "transacts any business within the state or contracts anywhere to supply goods or services in the state." CPLR 302(a)(1) is a single transaction statute, meaning "proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006]). In determining whether a defendant has transacted business within the meaning of CPLR 302(a)(1), courts look to the totality of the defendant's activities within the state, to decide if he has transacted business in such a way that it constitutes "purposeful activity," which is defined as "some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*Gary Null & Associates, Inc. v Phillips*, 29 Misc 3d 245, 906 NYS2d 449 [Supreme Court, New York County 2010] *citing McKee Electric Co. Inc. v Rauland-Borg Corp.*, 20 NY2d 377, 382, 283

NYS2d 34, 229 NE2d 604 [1967]; *see also Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467, 527 NYS2d 195 [1988] [one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, provided the defendant's activities here were purposeful, and there is a substantial relationship between the transaction and the claim asserted]).

While not all purposeful activity constitutes a transaction of business, and it is impossible to precisely fix those acts which do so, the Court of Appeals has held that "it is the quality of the defendants' New York contacts that is the primary consideration" (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007] (finding purposeful activity constituting a transaction of business where defendants' attempted to establish an attorney-client relationship in New York, and directly participated in that relationship through calls, faxes and e-mails that they projected into the state over an extended period)).

And, although limited contacts through telephone calls, mailings, and by facsimile, on their own are usually insufficient to confer personal jurisdiction under CPLR §302(a)(1) (*see International Customs Assoc., Inc. v Ford Motor Co.*, 893 FSupp 1251, 1261 [SDNY 1995]; *Granat v Bochner*, 268 AD2d 365 [1st Dept 2000]), such contacts may provide a basis for jurisdiction where the defendant "projected" himself by those means into New York in such a manner that he "purposefully availed himself. . . 'of the benefits and protections of its laws'" (*Fischbarg v Ducet,* 38 AD3d 270 [1st Dept 2007] [negotiation and execution of contracts by mail and telephone with persons residing in New York is not generally a sufficient basis for personal jurisdiction over non-domiciliaries]; *Wilhelmshaven Acquisition Corp. v Asher,* 810 FSupp 108 [SDNY 1993]; *Parke-Bernet Galleries,* 26 NY2d 13, 19 [1970], *quoting Hanson v*

Deckla, 357 US 235, 253 [1958]).

Fischbarg v Doucet (38 AD3d 270, 832 NYS2d 164 [1st Dept 2007]), involving a New York attorney's legal fee dispute over two non-domiciliaries is instructive. In *Fischbarg*, defendants sought out plaintiff, a New York practitioner previously unknown to them, in New York to perform legal services. The matter later gave rise to litigation involving defendants in Oregon. The Court stated, "Throughout plaintiff's representation, defendants made frequent phone calls to plaintiff in New York, and sent their e-mails and fax communications to him in New York. They made their payments to plaintiff's office in New York, where they consulted plaintiff about their lawsuit and formulated and executed their litigation strategy. Plaintiff has submitted itemized billing records for 238.4 hours of legal work, performed in conjunction with defendants and on their behalf. All of this work was done from plaintiff's New York office, including telephone depositions and phone conferences with the court in Oregon. Indeed, while plaintiff and his clients worked closely together in defense of the . . . lawsuit in Oregon, all of plaintiff's actions on his California clients' behalf took place in New York. A review of plaintiff's time logs, which support this action for fees, clearly shows that defendants' contacts with plaintiff, their New York counsel, were neither insubstantial nor sporadic . . . . By working with plaintiff on a consistent basis during the period in question, defendants 'transacted business' in New York sufficient to subject themselves to this State's jurisdiction over them in this fee dispute."

Here, the individual defendants' alleged retention of plaintiff to render legal services, coupled with their subsequent acts in connection with the retention, do *not* give rise to *in personam* jurisdiction under CPLR 302. Plaintiff's Amended Complaint alleges the following

contacts made by the individual defendants: (1) four emails from Pintsopoulos in January and February 2012 essentially thanking plaintiff, one email from Pintsopoulos in September 2012 and one telephone conversation between Pintsopoulos and plaintiff in April 2012 concerning WestPark's financial hardship; and (2) one email from Rappaport in September 2011 to plaintiff assuring that plaintiff will get paid. These very limited emails and telephone calls to plaintiff did not involve assisting plaintiff in its representation in the underlying matters in any way, as plaintiff argues. Although plaintiff performed legal services in New York, the subject Agreement was between plaintiff and WestPark, and not between plaintiff and the individual defendants, and therefore, it cannot be said that any agreement between plaintiff and the individual defendants was executed in New York. Further, plaintiff failed to show that its performance of its services in New York is sufficient, in and of itself, to confer jurisdiction over the individual defendants, especially in the absence of any indication that the individual defendants engaged in any purposeful activity in this State in connection with matters involved in this action.[6]

The cases cited by plaintiff are factually distinguishable and not controlling (*see e.g.*, *Scheuer v Schwartz*, 42 AD3d 314 [1st Dept 2007] (finding that 302(a)(1) jurisdiction over a defendant existed where defendant, a Pennsylvania attorney retained by plaintiff in Massachusetts in connection with subject legal representation in a probate proceeding in Connecticut, made 10 trips to New York, during which he reviewed documents and had several

[6] And, even considering plaintiff's submission, in sur-reply, that Rappaport inquired as to whether he and Pintsopoulos "should coordinate together" with Rodman "on our defense," there is no mention of plaintiff law firm so as to indicate that the individual defendants sought out or solicited plaintiff in New York. Further, records created subsequent to Pintsopoulos's inquiry show that plaintiff reached out to Pintsopoulos several times in order to facilitate joint representation with Rodman.

meetings, and billed for work she performed in New York); *Reiner v Durand*, 602 F Supp 849 [DCNY 1985] (based on defendant's agent's activities in New York and fact that plaintiff's legal services were performed in New York, it was not "unfair to subject defendant to jurisdiction"); *Otterbourg, Steindler, Houston & Rosen v Shreve City Apts.*, 147 AD2d 327, 543 NYS2d 978 [1st Dept 1989] (finding jurisdiction where defendants "communicated with plaintiff by means of at least 93 telephone calls, many of which were originated by them, as well as by letters sent by them into the State; participated in settlement negotiations relating to the pending legal proceedings by telephone conference calls and an open telephone line into a meeting in New York; settled various aspects of the subject proceedings pending in New York; retained other New York attorneys to terminate their contractual relationship with plaintiff, and procure plaintiff's execution of a stipulation of substitution); *Watkins v Grutman*, 166 AD2d 191, 560 NYS2d 300 [1st Dept 1990] (denying dismissal based on *forum non conveniens* grounds and finding that New York was a proper forum, where defendants/attorneys accepted the subject case in New York, the retainer agreement was signed in New York, defendants are New York lawyers)).

Therefore, dismissal of the action against the individual defendants Rappaport and Pintsopoulos for lack of personal jurisdiction is warranted.

As to dismissal under the doctrine of *forum non conveniens*, a court may stay or dismiss an action if it finds "that in the interest of substantial justice the action should be heard in another forum" (CPLR §327(a)). "The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US

1108 [1985]). "This burden becomes even more onerous where the plaintiff is a New York resident" as in the case at bar (*Highgate Pictures, Inc. v De Paul*, 153 AD2d 126, 129 [1st Dept 1990]). However, a defendant can overcome this burden by showing that they will suffer disproportionate hardship. Among the factors to be considered are the residence of the parties, the location of the transaction giving rise to the cause of action, the applicability of the laws of another state or country, the location of the witnesses and any pending discovery, the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum where the plaintiff may bring suit (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479; *Daly v Metropolitan Life Ins. Co.*, 4 Misc 3d 887, 894 [2004]). Further, no one factor is controlling, since the doctrine of *forum non conveniens* is flexible in application, based on the facts and circumstances of each case.

In the case at bar, the individual defendants failed to demonstrate that they would suffer disproportionate hardship if the court denied their motion to dismiss for *forum non conveniens*. Plaintiff resides in New York, the legal services (which are at the heart of this action) occurred in New York, the witnesses and discovery relevant to the prosecution of the action are located in New York, and consequently, New York law applies to plaintiff's claims. There is no showing that California law applies to plaintiff's claims, and while defendants claim than California law applies to potential counterclaims, defendants provide no legal or factual support for this proposition. Defendants failed to show any undue burden on the New York courts, or the potential hardship to the defendants. Notably, while defendants claim that Pintsopoulos is amenable to suit in California, where this action, it is argued, should take place, Pintsopoulos resides in Florida; there is no showing that New York is any more burdensome than California to

Pintsopoulos, a Florida resident. Therefore, dismissal based on *forum non conveniens* is unwarranted.

As to dismissal pursuant to CPLR 3211(a)(7), when considering a motion to dismiss for failure to state a cause of action pursuant to this section, the pleadings must be liberally construed (*see*, CPLR 3026), and 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" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). "In deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims" *(Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

As to the first cause of action for breach of contract against WestPark, contrary to defendants' contention, plaintiff's failure to allege that it "adequately" performed under the Agreement is insufficient to warrant dismissal of this claim. The elements of a claim for breach of contract are (1) the existence of a contract, (2) due performance of the contract by claimant, (3) breach of the contract by the other party, and (4) damages resulting from the breach (*Morpheus Capital Advisors LLC v UBS AG,* 105 AD3d 145, 962 NYS2d 82 [1st Dept 2013]; *Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426, 913 NYS2d 161 [1st Dept 2010] ("The elements of such a claim include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages"); *Morris v 702 East Fifth Street HDFC*, 46 AD3d 478, 850 NYS2d 6 [1st Dept 2007] (same); *Renaissance Equity Holding,*

LLC v Al-An Elevator Maintenance Corp., 36 Misc 3d 1209(A), 954 NYS2d 761 (Table) [Supreme Court, Kings County 2012] ("The elements of a claim for breach of contract are (1) the existence of a contract, (2) *due* performance of the contract by plaintiff, (3) breach of the contract by defendant, and (4) damages resulting from the breach")(emphasis added) *citing Elisa Dreier Reporting Corp. v Global Naps Networks, Inc.*, 84 AD3d 122, 127 [2d Dept 2011] ("the essential elements [of a breach of contract claim are]: *to wit*, the existence of a contract, the plaintiff's performance pursuant to that contract, the defendants' breach of their obligations pursuant to the contract, and damages resulting from that breach)). Here, plaintiff alleges that it performed legal services for WestPark in "a professional manner and without objection by WestPark" (¶28); plaintiff obtained a dismissal of the complaint in WestPark's favor (¶29); and that plaintiff performed its legal services in good faith (¶70). WestPark allegedly failed to pay plaintiff pursuant to the Engagement Agreement, resulting in damages suffered by plaintiff. Plaintiff need not allege that it did not overbill or perform needless discovery. That WestPark disputes the adequate performance of plaintiff's legal services is not a factor for this Court to consider on a pre-Answer motion to dismiss. Therefore, dismissal of the breach of contract claim for failure to state a cause of action lacks merit.

As to plaintiff's second cause of action for account stated against WestPark, to state such a cause of action, plaintiff must allege defendant's receipt and retention of the subject statement of account without proper objection within a reasonable time (*see, e.g., Loheac v Children's Corner Learning Center*, 51 AD3d 476 [1st Dept 2008]; *Ruskin, Moscou, Evans & Faltischek v FGH Realty Credit Corp.*, 228 AD2d 294, 295 [1st Dept 1996]). The elements of the claim are: the existence of a debtor-creditor relationship, a mutual examination of the claims of the

respective parties, the striking of a balance, and an express or implied agreement that the party against whom the balance is struck will pay the debt (*Lapidus & Associates, LLP*, *supra citing Bank of New York-Delaware v Santarelli*, 128 Misc 2d 1003 [County Court, Greene County [1985] and *Parker Chapin Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375 [1st Dept 1977]). A party who receives an account for services rendered and thereafter either fails to timely object to the account, or makes partial payments on it, will be bound on the account, unless fraud, mistake or other equitable considerations are shown to impeach what is otherwise presumed a conclusive settlement (*Lapidus & Associates, LLP v Elizabeth Street, Inc.*, 25 Misc 3d 1226(A), 906 NYS2d 773 (Table) [Supreme Court, New York County 2009] *citing Morrison Cohen Singer and Weinstein, LLP v Waters*, 13 AD3d 51 [1st Dept 2004] (either partial payment or retention of invoices without objection may give rise to an account stated) and *Rosenman Colin Freund Lewis & Cohen v Edelman*, 160 AD2d 626 [1st Dept 1990], *appeal denied* 77 NY2d 802 [1991] (account stated where there was agreement to pay and failure to object within reasonable period of time)).

Here, plaintiff sufficiently alleged an account stated claim against WestPark by asserting that invoices were sent to WestPark (and/or the individual defendants) by e-mail and, in some instances, by mail as well, and that defendants received such invoices and retained them without objection within a reasonable time. Plaintiff also alleges that WestPark partially paying some of the invoices. WestPark's attempt to show that it's purported acceptance and payment of the invoices was a mistake made before it discovered plaintiff's improper billing and needless discovery practices is insufficient to defeat plaintiff's claim on a pre-Answer motion to dismiss for failure to state a cause of action. As to affidavits submitted by a defendant, such an affidavit

"will almost never warrant dismissal under CPLR 3211 unless they "establish conclusively that [petitioner] has no [claim or] cause of action" (*Lawrence v Miller*, 11 NY3d 588, 873 NYS2d 517 [2008] *citing Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). Here, defendants' submissions do not conclusively show plaintiff has no cause of action, but raise issues as to the propriety of plaintiff's billing practices and billing based on alleged inappropriate discovery work. Thus, assuming the truth of the allegations that WestPark received numerous invoices, reminders, and requests for payment on a monthly and/or periodic basis, and that WestPark made partial payments on such accounts, dismissal of this claim is unwarranted.

As to the third cause of action for *quantum meruit* against all defendants, plaintiff sufficiently alleged a *quantum meruit* claim against the individual defendants under New York law. Initially, it is noted that "Under New York's choice of law rules, a *quantum meruit* claim is a claim in quasi-contract (*Futterman Org., Inc. v Bridgemarket Assocs. L.P.*, 278 AD2d 105, 718 NYS2d 40, 41 [1st Dept 2000]; *Landcom, Inc. v Galen Lyons Joint Landfill Comm'n*, 259 AD2d 967, 687 NYS2d 841, 842 [4th Dept 1999]), and as such, New York's choice-of-law analysis for contract claims apply to the *quantum meruit* claim (*Fieger v Pitney Bowes Credit Corp.*, 251 F3d 386 [2d Cir 2001]). Applying New York's "center of gravity" or "grouping of contacts" approach to choice-of-law questions in contract cases, the court finds that New York has the "most significant relationship to the transaction and the parties." According to plaintiff, a New York law firm, the services provided by plaintiff "were performed in New York" and none of the attorneys who handled the three matters at issue herein "ever traveled to California" in connection with plaintiff's representation of defendants (Natalie Shkolnik Affidavit ¶4). That the action for which plaintiff represented defendants was based in California is inconsequential in

light of plaintiff's contention that plaintiff did not perform its services in California.

Under New York law, in order to state a *quantum meruit* claim, plaintiff must allege "the performance of services in good faith, acceptance of the services by the person to whom they are rendered, an expectation of compensation therefor, and the reasonable value of the services" (*Georgia Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406, 926 NYS2d 494 [1st Dept 2011] *citing Freedman v Pearlman*, 271 AD2d 301, 304 [1st Dept 2000]).[7] Here, plaintiff alleges that "defendants" engaged plaintiff to provide legal services (¶7), that the individual defendants agreed (with WestPark) to be responsible for plaintiff's legal fees, that plaintiff performed legal services for them in good faith, they accepted such legal services, plaintiff expected to be compensated for such legal services, and that the reasonable value of such services is the portion of plaintiff's customary hourly rates multiplied by the number of hours plaintiff spent on behalf of the individual defendants. These allegations sufficiently state a *quantum meruit* claim against the individual defendants.

And, although generally, the existence of a valid and enforceable written contract governing the subject matter precludes a *quantum meruit* claim, (*Mucerino v Firetector, Inc.*, 306 AD2d 330 [2d Dept 2003]; *Aviv Const., Inc. v Antiquarium, Ltd.*, 259 AD2d 445, 687 NYS2d 344 [1st Dept 1999]), the record indicates that there is no claim that the Engagement Agreement was between the individual defendants and plaintiff. Instead, plaintiff alleges that "WestPark and Plaintiff entered into an engagement agreement" (¶¶8, 22), and that the "WestPark Engagement

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[7] While defendants cite *Fontaine v Home Box Office, Inc.*, 654 F Supp 298 [Dist. Court Cal 1986]) for the proposition that plaintiff must have expected payment from the individual defendants specifically, the 9th Circuit rejected this element, stating "the vast majority of California cases do not require that a plaintiff expect compensation from the defendant himself in order to prove a quantum meruit claim" (*In re De Laurentiis Entertainment Group Inc.*, 963 F 2d 1269 [9th Circuit 1992]).

Agreement is an enforceable contract between WestPark and Plaintiff" (¶23) that "applies to the WestPark matters" (¶24). Therefore, the Engagement Agreement does not preclude plaintiff's *quantum meruit* claim against the individual defendants.

However, plaintiff's *quantum meruit* claim against WestPark, which incorporates the allegations asserted in its breach of contract claim, is precluded by the existence of the Engagement Agreement, which is a valid, enforceable contract governing such parties' relationship (*Aviv Const., Inc. v Antiquarium, Ltd.*, *supra* (stating that "Plaintiff's own quantum meruit claim is internally inconsistent in that it incorporates the allegations contained in the breach of contract claim (which allege the existence of a contract) and also states that the extra work was done pursuant to the contract")).

Although, as plaintiff contends, "a party is not precluded from proceeding on both breach of contract and quasi-contract theories where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue" (*Curtis Properties Corp. v Greif Companies*, 236 AD2d 237, 653 NYS2d 569 [1st Dept 1997]), this exception does not appear to apply to plaintiff's claim against WestPark. The Engagement Agreement covers legal work performed on behalf of WestPark in connection with "claims" against "WestPark Capital, Inc. . . .and with any future matters that [plaintiff] agree[s] to undertake at [WestPark's] request." It is undisputed that plaintiff was engaged to perform legal services for WestPark for the three underlying matters pursuant to the Engagement Agreement. While WestPark disputes the *manner* in which plaintiff performed such legal services and consequently, the billing amounts arising from such work, the work performed, *i.e.*, discovery, was performed in connection with the three underlying matters, and thus, falls within the scope of the Engagement Agreement (*cf.*

Morgan, Lewis & Bockius LLP v IBuyDigital.com, Inc., 14 Misc 3d 1224(A), 836 NYS2d 486 (Table) [Supreme Court, New York County 2007] (declining to dismiss the *quantum meruit* claim where the parties argued over whether the engagement letter was meant to cover work on general corporate matters *unrelated to* the initial public offering) (emphasis added)). Therefore, since the legal fees sought arise out of work performed pursuant to the Engagement Agreement between plaintiff and WestPark, dismissal of the *quantum meruit* claim is warranted as against WestPark.

Finally, dismissal pursuant to California's Mandatory Fee Arbitration Act, California Business and Professions Code, §6200, *et seq.* is not warranted.

California's Mandatory Fee Arbitration Act sets forth a statutory scheme for arbitration and mediation of attorney-client disputes regarding fees and costs (*Fagelbaum & Heller LLP v. Smylie*, 174 Cal App 4th 1351, 95 Cal Rptr 3d 252 [Cal.App. 2 Dist 2009]).[8] Under the Act § 6201(a), an attorney is required to provide written notice to the client of his or her right to arbitration, "prior to or at the time of service of summons or claim in an action against the client, or prior to or at the commencement of any other proceeding against the client under a contract between attorney and client which provides for an alternative to arbitration under this article, for recovery of fees, costs, or both. . . . Failure to give this notice shall be a ground for the dismissal of the action or other proceeding. . . ." It is uncontested that plaintiff did not provide defendants

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[8] Section 6201(b)(1) provides that the above section does *not* apply to "Disputes where a member of the State Bar of California is also admitted to practice in another jurisdiction or where an attorney is only admitted to practice in another jurisdiction, and he or she maintains no office in the State of California, and no material portion of the services were rendered in the State of California." Plaintiff does not address defendants' contention that plaintiff does not fall within this exclusion to the Act.

with notice of their right to arbitration under the Act.

However, plaintiff established that defendants waived their right to pursue arbitration under the Act. Section 6201(d) provides that a client's right to "request or maintain" arbitration is waived as follows:

> . . . .by the client commencing an action or filing any pleading seeking either of the following:
> (1) Judicial resolution of a fee dispute to which this article applies.
> (2) Affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct.

The record demonstrates that on December 4, 2012, defendants filed a malpractice and overbilling action in the Superior Court of California against plaintiff, Auslander, and Shkolnik alleging that they performed needless discovery work in contravention of the Private Securities Litigation Reform Act (Defendants' Memorandum of Law, p. 7). Defendants also state that they previously filed a legal malpractice action on August 27, 2012 in the Central District of California against, *inter alia*, plaintiff, Auslander, Shkolnik, but this action was withdrawn (Defendants' Memorandum of Law, p. 7). Notably, this action was commenced on July 26, 2012, and defendants did not move to dismiss based on plaintiff's failure to comply with Act and present its request for arbitration, until December 12, 2012.[9] Having twice filed actions based on plaintiff's alleged malpractice and improper billing, the Court finds that defendants waived their right to arbitration under the Act.

It is also noted that the Act provides a mechanism to vacate a client's waiver of the right

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[9] Before filing its motion, and after this action was commenced, on August 24, 2012, defendants removed the state court action to the United States District Court for the Southern District of New York. On September 20, 2012, the Court remanded the action to state court for failure to plead the citizenship of each individual partner of the plaintiff. On September 21, 2012, plaintiffs sought reconsideration, which was denied. On October 5, 2012, plaintiffs filed a second notice of removal. On November 16, 2012, plaintiffs and defendants filed a Stipulation of Remand, which the Court so ordered on November 20, 2012.

to arbitration. The Act provides in §6201(e) that "If the client waives the right to arbitration under this article, the parties may stipulate to set aside the waiver and to proceed with arbitration." However, the provision does not apply as there is no such stipulation by the parties.

Thus, even though plaintiff failed to provide the required notice, dismissal on this ground is not warranted (*see, e.g.*, *Philipson & Simon v Gulsvig*, 154 Cal.App.4th 347, 64 Cal.Rptr.3d 504 [Cal.App. 4 Dist 2007] (citing §6201(d), and stating that "notwithstanding Philipson's [lawyer's] failure to properly serve Gulsvig [client] with the required arbitration notice, we conclude Gulsvig waived her right to arbitrate those distinct fee claims" premised on misconduct)). And, defendants presented no caselaw in support of its position that plaintiff's failure to provide them notice of their right to arbitration compels dismissal where defendants waived their right to arbitration by filing malpractice actions against plaintiff.

As to defendants' request, in the alternative, for a stay of this action, a stay pursuant to 6201(c) of the Act is unwarranted. Section 6201© provides that,

> Upon filing and service of the request for arbitration, the action or other proceeding shall be automatically stayed *until the award of the arbitrators is issued or the arbitration is otherwise terminated.* The stay may be vacated in whole or in part, after a hearing duly noticed by any party or the court, ..."

Even assuming that defendants' request, in their moving papers, constitutes "service" of the request for arbitration, there is no pending arbitration to which a stay would apply.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of defendants' motion to dismiss the Amended Complaint as to Richard Rappaport and Anthony Pintsopoulos for lack of personal jurisdiction, *forum non*

conveniens, and under California's Mandatory Fee Arbitration Act, California Business and Professions Code, Section 6200, *et seq* is granted solely on the ground of lack of personal jurisdiction, and the Amended Complaint is severed and dismissed against Richard Rappaport and Anthony Pintsopoulos; and it is further

ORDERED that the branch of defendants' motion to dismiss the Amended Complaint as to all defendants for failure to state a claim is granted solely to the extent that the *quantum meruit* claim as against WestPark Capital, Inc. is severed and dismissed for failure to state a claim; and it is further

ORDERED that defendant WestPark Capital, Inc. shall serve its Answer to the Amended Complaint within 30 days of service of a copy of this order with notice of entry; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the Decision and Order of the Court.

Dated: March 10, 2013

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD