Hoffman v Davis
2013 NY Slip Op 33383(U)
December 4, 2013
Supreme Court, New York County
Docket Number: 100208/12
Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

BARBARA T. HOFFMAN,
Plaintiff,

- v -

SHARYL R. DAVIS,
Defendant.

INDEX NO. 100208/12

MOTION SEQ. NO. 001

The following papers were read on this motion by defendant to dismiss and cross-motion by plaintiff.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ■ Yes ☐ No

Barbara T. Hoffman (plaintiff) instituted the herein against her former client Sharyl R. Davis (defendant) for legal fees for services provided in accordance with an alleged retainer agreement. Defendant moves to dismiss the complaint, pursuant to CPLR 3211(a)(8), for lack of personal jurisdiction. Also before the Court is a cross-motion by plaintiff pursuant to CPLR 3211(b) and (c) and CPLR 3212 for breach of the retainer agreement, and also an account stated for legal fees and costs and disbursements. Plaintiff also seeks in her cross-motion pre-judgment interest pursuant CPLR 5001. Discovery in this action has not commenced and the Note of Issue has not been filed.

BACKGROUND

Plaintiff states that she is a prominent arts and cultural heritage lawyer whose office is located in New York County. Plaintiff alleges that in or about January of 2005, she and the defendant entered into a written retainer agreement wherein plaintiff agreed to represent the defendant at a discounted rate, based on prompt payment, in connection with a work of art by

Camille Pissarro, entitled Le Marché (Le Marché matter). Le Marché had been withdrawn from an auction at Sotheby's in 2003 at the request of the United States Government which claimed that the artwork had been stolen in 1981 from a regional French museum by Emil Guelton (Affidavit of Plaintiff in Opposition to Defendant's Motion to Dismiss, at ¶ 3). Defendant's corporation was a good faith purchaser of Le Marché in 1984 from an art dealer in San Antonio, Texas, and defendant acquired the artwork pursuant to a divorce and division of assets in or about 1990 (*id.*). Plaintiff represented defendant in litigation the Southern District of New York which included motion practice, a six-day jury trial, an interlocutory appeal and a regular appeal to the Second Circuit Court of Appeals, as well as a petition for reconsideration and rehearing. Plaintiff proffers that she spent hundreds of hours on the Le Marché matter. Plaintiff states that she agreed that she would not charge the defendant for her time for legal services for the summary judgment motion she made in 2008, unless she were successful, on condition that the defendant pay her outstanding invoice promptly (*id.* at ¶ 13).

Plaintiff further states that contrary to defendant's arguments, she did inform defendant of her rights to dispute her legal fees, in compliance with the requirements of 22 NYCRR § 1215 and more than one year has passed since defendant was informed. From the time of her engagement plaintiff proffers that she has sent invoices to defendant which were paid, based on the original retainer entered into prior to the commencement of the litigation regarding Le Marché. Plaintiff further proffers that the costs and disbursements were presented with the invoices, documenting the expenses at the time the invoices were presented, and that defendant kept the invoices and did not object to them. Defendant however, currently owes plaintiff a total of $43,394.50 in unreimbursed costs and disbursements, and $130,404.00 for legal fees as per plaintiff's hourly rate and the modified retainer letter dated February 5, 2007.

Plaintiff commenced this action by the filing of a Summons and Complaint on January 6,

2012, seeking legal fees for services provided under theories of account stated and breach of contract. Defendant filed her answer on or about March 26, 2012, wherein she raised as the (1) first affirmative defense a lack of personal jurisdiction on the basis that service of process was not properly effected under CPLR 308(2), as well as the plaintiff's failure to timely file the affidavit of service with the Clerk of the Court, also pursuant to CPLR 308(2). The answer also raises seven other affirmative defenses for: (2) plaintiff's failure to notify defendant of her right to fee arbitration by service of a written notice pursuant to Part 137 of the Rules of the Chief Administrator of the Courts; (3) plaintiff's failure to provide defendant with a written retainer agreement in compliance with NYCRR 22 § 1215; (4) the contract between the parties is void as it violates Banking Law §§ 14-a and 5-501 and 5-511 of the General Obligations Law because plaintiff is charged interest on the unpaid balance at the rate of 18% per annum which exceeds the 16% maximum rate; (5) plaintiff may not collect pre-judgment interest from the defendant on the unpaid balance because there is no written retainer agreement signed by the defendant agreeing to the payment of interest; (6) plaintiff should not be able to collect an hourly fee from defendant because she is guilty of fraud, duress, misconduct and overreaching; (7) plaintiff engaged in duress of defendant in order to secure payment of improper and excessive fees; and (8) plaintiff is not entitled to the legal fees that she is seeking as she is not a skilled trial attorney.

Defendant filed her answer and now moves to dismiss the complaint, pursuant to CPLR 3211(a)(8), for lack of personal jurisdiction. Also before the Court is a cross-motion by plaintiff pursuant to CPLR 3211(b) and (c) and CPLR 3212 for breach of the retainer agreement, and also an account stated for legal fees and costs and disbursements. Plaintiff also seeks in her cross-motion pre-judgment interest pursuant CPLR 5001.

STANDARDS OF LAW

Dismiss

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature that fits within any cognizable legal theory (*see Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268 [1997]; *Salles v Chase Manhattan Bank,* 300 AD2d 226 [1st Dept 2002]).

Summary Judgment

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.,* 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of

material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

Defendant's Motion to Dismiss

Defendant moves to dismiss the complaint for lack of personal jurisdiction on the basis that service was not properly effectuated pursuant to CPLR 308(2). Specifically, the affidavit of service of plaintiff's process server states that on January 17, 2012 defendant was served by suitable age and discretion by leaving a copy of the summons and complaint with "Richard [ ] (Tenant)" at 317 N. Bluff, Anthony, Kansas, which the affidavit of service states is defendant's actual place of business (Notice of Motion, exhibit B). The affidavit of service further indicates that service was completed when a copy of the summons and complaint were mailed to defendant at the same address of delivery, 317 N. Bluff, Anthony, Kansas, on January 17, 2012 (*id.*). Defendant maintains that serving one of her temporary rental tenants in a small home she operates is not sufficient for suitable age and discretion as the tenant is not her employee nor was he authorized to accept service on her behalf. Further, defendant proffers that the affidavit of service was not filed with the Clerk of the Court until February 14, 2012, twenty-eight days

from the delivery and mailing, which is more than the twenty day period proscribed in CPLR 308(2), and as such renders service of process deficient.

In opposition plaintiff avers that this is a frivolous motion and that the address in Kansas is proper for service as it is the last known address that she has for defendant. Plaintiff states that this is the address she used to send defendant invoices when she represented defendant, and none of them were returned as undeliverable. Further, the delay in filing the proof of service was due to the process server timely filing the affidavit of service erroneously in Nassau County. Plaintiff maintains that she was not aware of the mistake until she was preparing a motion for a default judgment, and subsequently the process severer re-served defendant personally on April 4, 2012, and the affidavit of service was timely filed in New York County Supreme Court.

In his Affirmation Martin S. Kera, Esq. (Kera), defendant's counsel, states that plaintiff does a lot of unnecessary work. Specifically, when Kera first came into the case he proffers that he offered to waive any objection to service of process in exchange for an extension of time to answer, which plaintiff first accepted and then changed her mind (Kera Affirmation in Opposition to Plaintiff's Cross-Motion for Summary Judgment, ¶ 5). However, defendant does not state in opposition that the personal service of the summons and complaint on defendant on April 5, 2012 is defective or improper.

Firstly, plaintiff's "[d]elay in filing proof of service under CPLR 308 is merely a procedural irregularity, not jurisdictional, and may be corrected *nunc pro tunc* by the court . . . especially in the absence of a statement by defendant categorically denying that he ever received papers" (*Lancaster v Kindor*, 98 AD2d 300, 306 [1st Dept 1984], *affd* 65 NY2d 804 [1985] [internal citations omitted]). This procedural irregularity merely postpones defendant's time to answer, and because the defendant already served her answer on or about March 26, 2012, the Court finds it appropriate to deem the affidavit of service filed *nunc pro tunc* (*see Bell v Bell, Kalnick,*

Klee & Green, 246 AD2d 442 [1st Dept 1998]).

Defendant submits an affidavit in support of her motion admitting that proper service of the summons and complaint was made on April 4, 2012. As such, defendant's motion to dismiss for lack of personal jurisdiction is denied in light of the fact that she was personally served on April 4, 2012. Any argument that the prior service was improper is deemed moot.

Plaintiff's Cross-Motion

Plaintiff' cross-moves pursuant to CPLR 3211(b) and (c) and CPLR 3212 for breach of the retainer agreement, and also an account stated for legal fees with pre-judgment interests as well as costs and disbursements. Plaintiff also seeks in her cross-motion pre-judgment interest pursuant CPLR 5001.

I. *CPLR 3211(b)*

CPLR 3211(b) states as follows: "Motion to dismiss defense. A party may move for judgment dismissing one or more defenses, on the ground that the defense is not stated or has no merit." Defendant asserts eight affirmative defenses in her Verified Answer as detailed above. The first affirmative defense of lack of personal jurisdiction is dismissed as discussed above in defendant's motion to dismiss pursuant to CPLR 3211(a)(8). The Court notes that defendant essentially opposes plaintiff's amended cross-motion on the grounds that, *inter alia*, the motion is premature as discovery has not yet commenced and that defendant did dispute plaintiff's invoices. However, defendant does not specifically oppose or proffer arguments in opposition to plaintiff's motion to dismiss the affirmative defenses. As this portion of plaintiff's cross-motion is granted without opposition, and defendant's affirmative defenses are dismissed.

II. *CPLR 3211(c)*

Subdivision (c) of CPLR 3211 allows any court to treat a motion to dismiss as one for summary judgment, yet it requires that notice must be given to the parties of its intention to do so (*see Huggins v Whitney*, 239 AD2d 174 [1st Dept. 1997]; *Hendrickson v Philbor Motors, Inc.*,

102 AD3d 251, 258 [2d Dept 2012]). However, there are three exceptions to the notice requirement, one of which is when "CPLR 3211(c) treatment is specifically requested not by one party, but by all of the parties (*see Four Seasons Hotels v Vinnik*, 127 AD2d at 320-321, 515 N.Y.S.2d 1), or is at least requested by the same party that is aggrieved by the summary judgment determination (*see Wein v City of New York*, 36 NY2d 610, 620-621, 370 N.Y.S.2d 550, 331 N.E.2d 514)" (*Henrickson*, 102 AD3d at 258). Here, only plaintiff seeks conversion of the motion to dismiss as one for summary judgment. Furthermore, it cannot be said that in this pre-discovery status of the case that both parties have revealed their proof and clearly charted a summary judgment course (*Huggins*, 238 AD2d at 174). As such, the Court declines to treat the motion to dismiss as one for summary judgment and declines to order an immediate trial, and accordingly denies this portion of plaintiff's cross-motion.

III. *CPLR 3212*

Plaintiff cross-moves for partial summary judgment, pursuant to CPLR 3212, for judgment in her favor for defendant's breach of the retainer agreement, an account stated for legal fees with pre-judgment interests as well as costs and disbursements. Plaintiff avers in her affidavit that on December 10, 2004 she sent to defendant and defendant's husband the retainer letter, and on February 21, 2005 she sent it again after not receiving a signed copy from defendant (Affidavit of Plaintiff in Support of Amended Cross-Motion for Summary Judgment at ¶ 15), and she attaches the unsigned retainer agreement (*id.* at exhibit 5) as well as an amended retainer letter dated February 5, 2007 (*id.* at exhibit 7). Although the retainer letter was never signed by the defendant, on February 21, 2005 plaintiff states that she received a $500.00 check from the defendant, as well as a check for $2,400.00 (*id.* at ¶ 15, 16). Plaintiff states that she informed defendant that the discounted rate she extended to her, a billable-hour rate at $325.00 per hour, was contingent on prompt payment within 15 days and may be lost if payment was not made (*id.* at ¶ 21). This language was located at the lower part

of the invoice (*id.*). Plaintiff acknowledges that she agreed she would not charge the defendant for her time for legal services for the summary judgment motion she made in 2008, unless she were successful, on condition that the defendant pay her outstanding invoice promptly, yet this condition was violated.

Additionally, plaintiff maintains that defendant not only kept the invoices without protest, she made partial payments and has admitted that she received the invoices. Specifically, in July of 2008 defendant acknowledged that she owed legal fees and costs and disbursements as set forth in the July 31, 2008 invoice, by her payment of $10,000.00 on September 18, 2008 (Plaintiff Memorandum of Law at pg. 28).

In opposition defendant proffers that plaintiff's cross-motion is premature as no discovery has been conducted and there are triable issues of fact which require denial of the motion. Specifically defendant argues that there is no written or signed retainer agreement between the parties, even though plaintiff references a signed agreement in paragraph 14 of her affidavit. Also, defendant points to paragraph 16 of the plaintiff's affidavit wherein she admits that defendant did not return a signed copy of the retainer agreement, and proffers that there is a triable issue of fact concerning the terms of the retainer agreement. Defendant maintains that there was a contingency fee agreement between the parties from at least September of 2008, and notwithstanding this agreement, plaintiff billed the defendant on an hourly basis (Affidavit of Defendant in Opposition to Plaintiff's Amended Cross-Motion, ¶ 3[c]). Further, defendant states that plaintiff is not entitled to an account stated since she objected to plaintiff's bills and attaches various emails and letters wherein the parties discuss the legal fees outstanding, whether it was agreed that the work will be done on a contingency basis and wherein defendant had disputed plaintiff's invoices and the plaintiff attempts to settle outstanding invoices where the defendant raised an objection (*id.* at ¶ 4 and exhibit 1).

There is also a dispute between the parties as to whether after September 9, 2008 the

parties agreed the Le Marché matter was done on a contingency basis and whether defendant was still required to pay all of the costs and disbursements. Although plaintiff does submit documentation wherein defendant paid certain invoices without objection, there is ample evidence before the Court that defendant had disputed plaintiff's invoices as well as her hourly rate, as she believed that the matter was taken on contingency. Additionally, there is no signed retainer agreement submitted by the parties.

> "22 NYCRR 1215.1, otherwise known as the 'letter of engagement rule,' was promulgated by joint order of the Appellate Divisions, and applies to all civil actions where the amount in controversy is $3,000 or more. The rule requires attorneys to provide all clients with a written letter of engagement explaining the scope of the legal services, the fees to be charged, billing practices to be followed, and the right to arbitrate a dispute under Part 137 of the Rules of the Chief Administrator" (*Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54, 60 [2d Dept 2007]; 22 NYCRR 1215.1[b]).

However, "[t]he language of 22 NYCRR 1215.1 contains no express penalty for noncompliance . . . nor is it underscored by a specific disciplinary rule" (*Seth Rubenstein, P.C.*, 41 AD3d at 60-61; *cf.* 22 NYCRR 1400.3).

The fact that plaintiff failed to secure a written retainer agreement or letter of engagement from a client in a non-matrimonial action does not preclude her from seeking to recover her fees in quantum meruit the fair and reasonable value of services rendered on behalf of defendant prior to her discharge as counsel (*Seth Rubenstein, P.C.*, 41 AD3d at 64, citing *Campagnola v Huholland, Minion & Roe*, 76 NY2d 38 [1990]; *see also In re Estate of Feroleto*, 6 Misc3d 680, 684, 2004 NY Slip Op 24495 [Sur Ct, Bronx County 2004] [court awarded attorney who did not secure a signed retainer agreement an award of attorneys fees on a quantum meruit basis]). "[Plaintiff], as the attorney who failed to properly document the fee agreement in writing as required by 22 NYCRR 1215.1, bears the burden of establishing that the terms of the alleged fee agreement were fair, fully understood, and agreed to by [the defendant]" (*Seth Rubenstein, P.C.*, 41 AD3d at 63).

Plaintiff at this juncture is not entitled to judgment on her account stated cause of action as there has not been an agreement upon the balance of the indebtedness and defendant has disputed some of plaintiff's invoices (*see Abbott, Duncan & Weiner v Ragusa*, 214 AD2d 412, 413 [1st Dept 1995] ["An account stated is an account, balanced and rendered, with an assent to the balance either express or implied" yet there can be no account stated if there is any dispute about the account], *citing Interman Indus. Prods. v R.S.M. Electron Power*, 37 NY2d 151, 153 [1975]; *Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 478 [1st Dept 2002] ["the very meaning of an account stated is that the parties have come together and agreed upon the balance of the indebtedness..."]). Furthermore, "a cause of action alleging an account stated cannot be utilized simply as another means to attempt to collect under a disputed contract" (*see Ross v Sherman*, 57 AD3d 758 [2d Dept 2008]).

Turning to plaintiff's cause of action for breach of contract, "an unsigned agreement may be enforceable, provided there is objective evidence establishing that the parties intended to be bound" (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369 [2005]; *see also Brighton Inv., Ltd. v Har-Zvi*, 88 AD3d 1220, 1222 [3d Dept 2011] ["an exchange of e-mails may constitute an enforceable contract, even if a party subsequently fails to sign implementing documents"]). At this pre-discovery stage, there are issues of fact as to the exact terms which govern the relationship between the parties and as such summary judgment is inappropriate at this juncture. Accordingly, that portion of her cross-motion is denied. Furthermore, in light of the foregoing, it follows that plaintiff's request for pre-judgment interest is also denied. The Court has considered the parties remaining arguments and finds them to be unavailing.

CONCLUSION

Accordingly, it is

ORDERED that defendant Sharyl R. Davis' motion to dismiss the complaint, pursuant to CPLR 3211(a)(8), for lack of personal jurisdiction is denied as moot; and it is further,

ORDERED that the portion of plaintiff's cross-motion pursuant to CPLR 3211(b) is granted without opposition, and the defendant's affirmative defenses are hereby dismissed; and it is further,

ORDERED that the portions of plaintiff's cross-motion pursuant to CPLR 3211(c) and CPLR 3212 are denied; and it is further,

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon the defendant; and it is further,

ORDERED that the parties are directed to appear for a Preliminary Conference at 11:00 a.m. on January 15, 2014 at 60 Centre Street, Room 341, Part 7.

This constitutes the Decision and Order of the Court.

Dated: 12/4/13

PAUL WOOTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE