Spielman Koenigsberg & Parker, LLP v Taxi Club Mgt., Inc.
2014 NY Slip Op 33282(U)
December 10, 2014
Supreme Court, New York County
Docket Number: 110954/2011
Judge: Eileen Bransten

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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SPIELMAN KOENIGSBERG & PARKER, LLP,

Plaintiff,

Index No. 110954/2011
Motion Seq. Nos.: 006 & 007
Motion Date: 7/23/2014

-against-

TAXI CLUB MANAGEMENT, INC. and EVGENY A. FREIDMAN aka GENE FREIDMAN, Individually,

Defendants.

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EILEEN BRANSTEN, J.:

Motion sequence numbers 006 and 007 are consolidated for disposition.

This action involves a dispute over accounting services performed by plaintiff Spielman Koenigsberg & Parker, LLP ("SKP") for defendants Taxi Club Management, Inc. ("Taxi Club") and Evgeny A. Freidman, and outstanding amounts allegedly owed by defendants for those services. The five-count complaint asserts causes of action for breach of contract, unjust enrichment, and quantum meruit against both defendants, and fraud and fraudulent inducement against Freidman only. In their amended answer, defendants assert counterclaims against SKP for malpractice, negligence, and breach of contract.

In motion sequence 006, SKP now seeks summary judgment on its claims, in the amount of $285,866 and dismissal of defendants' counterclaims. In motion sequence 007, Defendants cross-move for summary judgment dismissing the complaint.

I. Facts

SKP is a professional accounting firm located in New York City. (Compl. ¶¶ 1, 5.) Freidman is a licensed attorney in New York and the owner and president of Taxi Club, a company that owns and leases taxi medallions in New York City. *See* Affidavit of Freidman ("Freidman Aff.") ¶¶ 1, 4; Pl.'s Rule 19-a St. ¶ 2; Defs.' Resp. ¶ 2.

On January 27, 2010, SKP sent defendants a letter of engagement ("LOE"), setting forth certain accounting services that SKP would provide to defendants. (Freidman Aff. Ex. D.) In the LOE, the parties agreed that SKP would provide tax consulting services "related to 2009 and 2010 tax issues" regarding Internal Revenue Service audits. *Id.* The parties also agreed that SKP would provide "periodic accounting or consulting services ... in connection with [Freidman's] real estate entities, leasehold corporations, management companies, miscellaneous operating companies, cab corporations, as well as in regard to the personal returns for [Freidman] and certain Company personnel and family members." *Id.* SKP agreed to prepare 2009 and 2010 tax returns and sales tax filings for Freidman and his entities, as well as corporate and personal financial statement compilations. The LOE provided for "an annual 'true-up' meeting if . . . require[d] . . . at year end," presumably referring to the year end of 2010. *Id.*

The LOE further provided, in pertinent part, as follows:

> If your returns are selected for audit the costs to represent you in such audits are included with the monthly retainer (mentioned below). ...
>
> We will notify you immediately of any circumstances that could significantly affect these estimated fees. This estimate is based on the availability of all documentation necessary to complete the procedures and that unexpected circumstances will not be encountered during the procedures.
>
> In connection with the abovementioned services our fee will be a $20,000 monthly retainer for the calendar years 2010 and 2011. Additionally, you will be charged for out-of-pocket expenses incurred in connection with the performance of the above referenced services.
>
> You may occasionally want us to undertake a special project beyond the regular services contemplated in this agreement. In such cases, we would obtain your agreement in advance on a reasonable billing rate for the project.
>
> Both parties agree that at the end of 2011 a discussion will be held to analyze the amount of time actually incurred in regard to the engagement and compare to the amount paid by the monthly retainers – and see if a 'true-up' in regard to fees is appropriate.

Id. Freidman signed the LOE on February 21, 2010. *Id.*

It is undisputed that "SKP was paid $280,000.00 by the Defendants for fourteen (14) months of accounting services," for the calendar year 2010 and the first two months of 2011. *See* Defs.' Rule 19-a St. ¶ 7; Pl.'s Resp. ¶ 7; Freidman Aff. ¶ 13. At some point in February or March 2011, a dispute arose among the parties concerning payments

allegedly owed to SKP and a "true-up" of outstanding fees that purportedly exceeded defendants' monthly retainer. *See* Affidavit of Jonathan B. Taylor ("Taylor Aff.") ¶¶ 16-17; Freidman Aff. ¶ 18. By letter dated March 24, 2011, SKP resigned its engagement with defendants. *See* Affirmation of Keith J. Singer Ex. M. On April 14, 2011, SKP transmitted to Freidman its "final invoice for 2010 and 2011," an amount totaling $285,866 ($35,050 for 2010 and $250,816 for 2011). *See* Taylor Aff. Ex. J. SKP commenced the instant action when defendants failed to pay the invoice. *Id.* ¶ 18.

II. Analysis

Presently before the Court are the parties' cross-motions for summary judgment. Defendants contend that plaintiff's claims should be dismissed, while plaintiff asserts that there are no material facts in dispute and that it is entitled to judgment on its claims, as well as dismissal of defendants' counterclaims.

It is well-understood that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established the absence of any material issues of fact, requiring judgment as a matter of law. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012) (citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of

material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). When deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007). However, mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 N.Y.2d at 562; *see also Ellen v. Lauer*, 210 A.D.2d 87, 90 (1st Dep't 1994) ("[it] is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists ...") (citations omitted).

A. *Breach of Contract (first cause of action)*

SKP argues that it is entitled to summary judgment on its breach of contract claim, based upon the LOE, SKP's outstanding invoices, and the affidavit of Jonathan Taylor, an SKP partner. SKP argues, alternatively, that it has established an account stated. Defendants counter that the LOE is unenforceable for lack of specificity, consideration, and mutual obligation, and that SKP waived any claims for additional fees.

The elements of a breach of contract cause of action are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and

resulting damages." *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010).

> The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent. The best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.

Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (2002) (internal quotation marks and citations omitted). "Put another way, the aim is a practical interpretation of the expressions of the parties to the end that there be a realization of [their] reasonable expectations." *Sutton v. East Riv. Sav. Bank*, 55 N.Y.2d 550, 555 (1982) (internal quotation marks and citations omitted). This includes "not merely literal language, but whatever may be reasonably implied therefrom must be taken into account," and "unless there are reservations to the contrary, embraced in the interpretative result should be any promises which a reasonable person in the position of the promisee would be justified in understanding were included." *Id.* (internal quotation marks and citations omitted).

"Even if parties intend to be bound by a contract, it is unenforceable if there is no meeting of the minds, i.e., if the parties understand the contract's material terms differently." *Gessin Elec. Contractors, Inc. v. 95 Wall Assoc., LLC*, 74 A.D.3d 516, 518 (1st Dep't 2010). To this end, "definiteness as to material matters is of the very essence

in contract law. Impenetrable vagueness and uncertainty will not do," and "a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable." *Joseph Martin, Jr., Delicatessen v. Schumacher*, 52 N.Y.2d 105, 109 (1981) (citations omitted).

Here, it is undisputed that defendants paid $20,000 per month for the 14 months up until SKP's termination of the LOE. *See* Defs.' Rule 19-a St. ¶ 7; Pl.'s Resp. ¶ 7; Freidman Aff. ¶ 13; Taylor Aff. ¶ 14. SKP's claim for $285,866 is based upon invoices prepared under the "true-up" provision of the LOE. *See* Compl. ¶¶ 11-18; Singer Affirm. Ex. D. Under this provision, the parties "agree[d] that at the end of 2011 a discussion [would] be held to analyze the amount of time actually incurred in regard to the engagement and compare to the amount paid by the monthly retainers – and see if a 'true-up' in regard to fees is appropriate." (Singer Affirm. Ex. D.) This provision did not obligate defendants to pay amounts demanded by SKP in the instant action. At most, the provision obligated the parties to have "a discussion" at an unspecified time and place. *Id.* The LOE fails to explain how the "amount of time actually incurred" was to be "analyze[d]" at this discussion, how and by whom the "time" was to be calculated or valued, how the purported "true-up" was to be performed, and what circumstances would render "a 'true-up' in regard to fees appropriate." *Id.* Rather, the "appropriate[ness]" of the "true-up" was left to the subjective interpretation of either party at the time of the

"discussion." *Id.* Nor does the LOE identify a fee structure that would apply to the purported "true-up," such as an hourly fee, a flat fee, or some other arrangement. In essence, this provision lacks definiteness to render it enforceable, and constitutes an unenforceable agreement to agree.

This conclusion is further supported by other provisions of the LOE. For example, the parties agreed in the LOE that, for projects undertaken by SKP "beyond the regular services contemplated in th[e] agreement," SKP "would obtain [defendants'] agreement in advance on a reasonable billing rate for the project[s]." *Id.* The LOE also provided that SKP "will notify [Freidman] immediately of any circumstances that could significantly affect these estimated fees." *Id.* Based upon the plain language of the LOE, it could not possibly have been the parties' reasonable expectation that defendants, having already made full monthly payments totaling $280,000, would then pay an additional $285,866 – essentially doubling the contract price – without defendants' "agreement in advance," especially when the "agreement in advance" was required under the LOE. *Id.* Nor could the parties have reasonably expected the doubling of SKP's fees upon termination of the parties' agreement, where none of the evidence indicates that, during the 14 months of the parties' business relationship, SKP notified defendants at all – let alone "immediately" – of any circumstances that could or did affect its fees. *Id.* For the foregoing reasons, SKP's breach of contract cause of action is dismissed.

The Court notes SKP's assertion that "the monthly retainer of $20,000.00 was to be a down payment." (Affidavit of Gary Parker in Opposition to Summary Judgment ("Parker Aff.") ¶¶ 11, 18.) The characterization of the monthly payment as a down payment is consistent with SKP's legal theory, but it is not supported by the law or the plain language of the LOE. The Court also notes SKP's reliance on *Verizon N.Y. Inc. v. Choice One Communications of N.Y.*, 2010 WL 4624580 (Sup. Ct. N.Y. Cnty. 2010), in support of its assertion that "true-up" clauses are "recognized and allowable in New York State contracts." (SKP's Moving Br. at 8.) In *Verizon N.Y. Inc.*, the court enforced a true-up provision. However, the "true-up" at issue in that case was governed by provisions of the parties' agreement, an arbitration decision issued by the New York Public Service Commission, and "rates, terms, and conditions [of the parties'] respective state tariffs." *Verizon N.Y. Inc.*, 2010 WL 4624580 at *1-2. In "calculat[ing] the net true-up amount due," there was "no dispute as to accuracy of the formulas used for the calculations or the results of the calculations." *Id.* at *10. Significantly, the court determined that the defendant "knew the rates and ratio the parties have been using to bill each other since the New York [Public Service Commission's] Arbitration Decision," the defendant "reviewed Verizon's initial true-up calculation," "understood where Verizon was getting its numbers from; concurred in the assumptions Verizon was making; and confirmed that Verizon was using data [the defendant] had provided to Verizon." *Id.* at

*11. No such facts exist in the instant action that would shore up the indefiniteness of the true-up provision contained in the LOE. Therefore, *Verizon N.Y. Inc.* is distinguishable on its facts and fails to raise a factual issue.

SKP argues, in the alternative, that it is entitled to summary judgment on the theory of account stated. An account stated requires a showing that defendants "received and retained [an] invoice without objection for a reasonable time," thereby "warranting summary judgment for plaintiff." *Rosenberg Selsman Rosenzweig & Co. v. Slutsker*, 278 A.D.2d 145, 145 (1st Dep't 2000). "An essential element of an account stated is an agreement with respect to the amount of the balance due." *Erdman Anthony & Assoc. v. Barkstrom*, 298 A.D.2d 981, 981-82 (4th Dep't 2002) (citing *Interman Indus. Prods. v. R. S. M. Electron Power*, 37 N.Y.2d 151, 153-54 (1975).

Within the breach of contract cause of action, SKP alleges that it provided invoices to defendants, "who received the same without objection," and that "a reasonable period of time to review and object to the invoices has passed, and the Defendants have never substantially objected to the same, either orally or in writing." (Compl. ¶¶ 19-20.) These allegations sufficiently plead SKP's account stated cause of action. However, the evidence makes clear that defendants objected to SKP's invoices. SKP transmitted its final invoices to Freidman via email on April 14, 2011 at 11:38 a.m. *See* Taylor Aff. Ex. J. In the parties' response emails later the same day, they argue over the invoices, and

SKP, just a few hours later, interprets Freidman's email response to the invoices to mean "that we will proceed with litigation." (Singer Affirm. Ex. N.) SKP's final email to Freidman, on April 14, 2011 at 5:35 p.m., stated: "[b]efore we go down the more difficult road – if there is any opportunity for civil discussion to reach an amicable agreement we should definitely make that happen." *Id.* This evidence demonstrates that Freidman objected to the invoices immediately, that SKP acknowledged his objection, and, significantly, that the parties never reached agreement with respect to the balance due as indicated in SKP's final invoices. *See Healthcare Capital Mgm't v. Abrahams*, 300 A.D.2d 108, 108 (1st Dep't 2002) (objection less than one month after invoice was sent was timely); *M & A Constr. Corp. v. McTague*, 21 A.D.3d 610, 611-612 (3d Dep't 2005) ("[w]here either no account has been presented or there is any dispute regarding the correctness of the account, the cause of action fails"); *Sieratzki v. Chow*, 2014 WL 5364099 at *4 (Sup. Ct. N.Y. Cnty. 2014) (plaintiff failed to establish an account stated where the defendant "objected to the invoices when he received them, or within a reasonable time thereafter"); *R.E.L. Int'l Inc. v. Diamonds By Janet Ltd.*, 2011 WL 1527185 at *9 (Sup. Ct. N.Y. Cnty. 2011) ("[r]eturning the Jewelry at Issue on the same day as receiving same invoices constitutes an objection within a reasonable time"). Where, as here, defendants clearly objected to the SKP's invoices, SKP may not utilize an account stated theory "simply as another means to attempt to collect under a disputed

contract." *Erdman Anthony & Assoc.*, 298 A.D.2d at 982 (internal quotation marks and citation omitted). Accordingly, SKP's account stated cause of action is dismissed.

For the foregoing reasons, the first cause of action is dismissed in its entirety.

B. *Unjust Enrichment & Quantum Meruit (second and third causes of action)*

SKP's unjust enrichment cause of action is based on allegations that, at defendants' request, SKP continued to render services to defendants after they ceased making payments to SKP. SKP claims that defendants "repeatedly promised to remit past due payment to SKP provided that additional accounting services were rendered." (Compl. ¶ 27.) According to SKP, defendants never paid for these services and, therefore, were unjustly enriched.

In an action for unjust enrichment, plaintiffs must show that they "conferred a benefit upon the defendant[s], and that the defendant[s] will obtain such benefit without adequately compensating plaintiff[s] therefor." *Nakamura v. Fujii*, 253 A.D.2d 387, 390 (1st Dep't 1998). Here, it is undisputed that the LOE is a valid and enforceable contract governing the parties' relationship, thereby precluding recovery in quasi contract. *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1987) ("existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter").

Accordingly, SKP's second cause of action for unjust enrichment is dismissed.

For the same reason, SKP's third cause of action, which is based upon the sole allegation that "SKP is entitled to be paid for the quantum meruit value of its services" is dismissed. *See* Compl. ¶ 33; *Clark-Fitzpatrick, Inc.*, 70 N.Y.2d at 388; *see also Aviv Constr. v. Antiquarium, Ltd.*, 259 A.D.2d 445, 446 (1st Dep't 1999) ("[t]he existence of a valid and enforceable written contract precludes a quantum meruit claim").

C. *Fraud & Fraudulent Inducement (fourth and fifth causes of action)*

SKP's fraud-based claims are asserted against Freidman only. These claims are based upon allegations that Freidman promised to pay SKP's monthly retainer of $20,000 and "to induce [SKP] to continue rendering services for the Defendants, that the parties would 'true-up' actual time spend [sic] and fees incurred." (Compl. ¶¶ 36-37, 42-43.) SKP alleges that Freidman's promises of payment were false, that he never intended to fulfill his promises, and that SKP reasonably relied upon these promises of payment in performing services for defendants. *Id.* ¶¶ 38-39, 44-47.

"The essential elements of an action for fraudulent inducement are the representation of a material existing fact, falsity, scienter, deception and injury." *Century 21 v. Woolworth Co.*, 181 A.D.2d 620, 625 (1st Dep't 1992). However, "[a] cause of action for breach of contract cannot be converted into one for fraud by merely alleging

that defendant did not intend to fulfill the contract." *Rochelle Assoc. v. Fleet Bank of N.Y.*, 230 A.D.2d 605, 606 (1st Dep't 1996). It is well-settled that a fraud claim will be dismissed where "the only harm alleged . . . relates to plaintiff's claim for breach of contract." *Sass v. TMT Restoration Consultants Ltd.*, 100 A.D.3d 443, 443 (1st Dep't 2012).

Here, it is undisputed that defendants paid the full, $20,000 monthly retainer amounts, pursuant to the LOE, until SKP terminated the contract. Nothing contained in the record suggests that defendants intended to avoid payments or promises relating to services provided by SKP, or that defendants made any representations that were not already embodied in the LOE. Specifically, Freidman's alleged promise concerning a "'true-up' [of] actual time spen[t] and fees incurred" was expressly contained in the LOE, rendering the fraud claims duplicative of the breach of contract cause of action. *HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185, 206 (1st Dep't 2012) (fraudulent inducement claim "can be predicated upon an insincere promise of future performance only where the alleged false promise is *collateral* to the contract the parties executed; if the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract"); *see also Stewart v. Maitland*, 39 A.D.3d 319, 319 (1st Dep't 2007) ("cause of action for fraud . . . was duplicative of plaintiff's contract claim, inasmuch as it alleged no factual basis for recovery other than defendants'

failure to keep promises; no damages were sought thereunder that would not be recoverable under a contract measure of damages").

SKP repeatedly argues that its fraud claims are based upon Freidman inducing SKP to perform "additional services" for which Freidman had no intention of paying. *See* SKP Moving Br. at 13; SKP Reply Br. at 10-11. Conspicuously absent from SKP's submissions, however, is any detail concerning "the facts and circumstances of the alleged fraud with respect to the misrepresentations alleged to have been made by the defendant," as is required by CPLR 3016(b). *Krause & Krause v. Gelman*, 167 A.D.2d 299, 299 (1st Dep't 1990); *see also Hernandez v. N.Y. City Law Dep't Corp. Counsel*, 258 A.D.2d 390, 390 (1st Dep't 1999) (holding plaintiff's fraud claim defective where "she fail[ed] to specify the misrepresentation on which she relied to her detriment or the details of the other circumstances constituting the wrongs for which she would recover"). The only references to Freidman's promises referred to the LOE, rendering any such promises duplicative of the breach of contract claim. *See e.g.* Taylor Aff. ¶ 77 (SKP claiming that its work pursuant to the LOE "was exceeding the $20,000.00 monthly retainer," to which Freidman allegedly "assured" SKP that it "would be paid"); *id.* ¶ 79 (Freidman allegedly "continued to assure [SKP] that [it] would be paid for the work rendered").

For the foregoing reasons, SKP's fraud claims contained in the fourth and fifth causes of action are dismissed, and the complaint is dismissed in its entirety.

D. *Defendants' Counterclaims*

Defendants' first counterclaim for negligence is based upon their allegation that SKP "carelessly, negligently and unskillfully perform[ed] accounting and related services," and that, as a result, defendants were "subject to potential audits, tax liabilities and other damages and expenses." (Amended Answer ¶ 20.) Defendants' second counterclaim alleges that SKP "breached its duty to the Plaintiffs by deviating from acceptable standards in the accounting community and failing to exercise the requisite skill and knowledge of accountants engaged in the practice of accounting." *Id.* ¶ 24. Defendants' third counterclaim for breach of the LOE is based upon allegations that SKP "perform[ed] services in a sub-standard, sloppy and deficient manner," failed to "exhibit or act in a skillful, professional and knowledgeable manner with regard to the accounting services" provided to defendants, and failed to "properly counsel and advise" defendants concerning "their tax obligations and the appropriate treatment thereof." *Id.* ¶ 27.

In support of its motion for summary judgment dismissing these counterclaims, SKP submits the deposition testimony of the following individuals: Freidman; Andrea Dumitru Parcalaboiu (Dumitru), an attorney who serves as Taxi Club's chief financial

officer, *see* Taylor Aff. Ex. F at 6, 10-11; and Jeffrey Getzel, a certified public accountant who currently serves as defendants' accountant.[1] *See* Taylor Aff. Ex. G at 8, 15. Freidman testified that he "can't answer . . . conclusively" how SKP's services "were substandard, sloppy, deficient, and otherwise failed to meet appropriate accounting standards," *id.* Ex. E at 32-34, 49-52, or how SKP was "careless, negligent, or unskillful in connection with accounting and related services" on behalf of defendants. *Id.* at 43-44, 48-49. Freidman testified that he "can't answer specifically" how SKP "deviated from acceptable standards in the accounting community." *Id.* at 49-50. Freidman could not identify or describe how the "acts, omissions, and errors of the plaintiff have resulted in damage" (*id.* at 35-36), or how SKP "breached the terms of the retainer agreement." *Id.* at 54. In response to all of these questions, Freidman deferred to Getzel, his current accountant. Freidman testified that neither he nor Taxi Club has been subjected to an audit as a result of an error committed by SKP, and that he does not know of any tax liability to defendants as result of an error by SKP. *Id.* at 37, 47.

Dumitru stated that she could not testify as to "exactly what [SKP] did or didn't do", "where it is that SKP failed to perform its job functions", or how SKP's accounting

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[1] According to Taylor's affidavit, Getzel testified that he has represented defendants since April 2011. *See* Taylor Aff. ¶ 58. This is consistent with Freidman's testimony, where he stated that Getzel has been Freidman's accountant since "spring of 2011." *Id.* Ex. E at 34. Getzel's testimony, however, states that Getzel has been defendants' accountant since April 2010. *Id.* Ex. G at 8. The discrepancy has no impact on the Court's decision.

services were "substandard." *See* Taylor Aff. Ex. F at 16, 17, and 37. Dumitru testified that she had never heard that SKP's services were substandard, sloppy, deficient, or failed to meet appropriate accounting standards. *Id.* at 38-39. She did not know if Taxi Club had incurred financial damage as a result of SKP's services, and she was unable to describe how SKP "carelessly, negligently and unskillfully performed it[s] accounting services." *Id.* at 40, 42. Like Freidman, Dumitru deferred to Getzel for responses to these questions.

Getzel testified that he was "not sure of the definition of substandard." *See* Taylor Aff. Ex. G at 64. Getzel testified that SKP provided "sloppy" service and, as an example, identified one instance where he believed that SKP improperly depreciated property, but stated that defendants had no present financial damage as a result of "sloppy" work. *Id.* at 65. Getzel testified that penalties were imposed for improperly filed tax returns for certain "S corporations" that were actually "C corporations." *Id.* at 66-67. Getzel could not identify a "sum total" of the penalties, but he "believe[d] that those [penalties] were less than $20,000." *Id.* at 67. Getzel testified that SKP's services were "deficient" in that various intercompany loans were not verified or reconciled, and he questioned whether this practice constituted a lack of "due care." *Id.* at 68-69, 71. Getzel testified that defendants had not been subject "to any audits as a result of the sloppiness or deficiency" that he had testified about. *Id.* at 72. Getzel could not testify as to the "total amount of

additional tax liability that had been imposed upon the defendants and/or any of the corporate entities and individuals . . . as a result of sloppiness or deficiency of [SKP's] services." *Id.* at 73. Getzel was not aware of defendants' failure to file any tax returns that resulted in a penalty. *Id.* at 145-147.

This testimony shows, prima facie, the dearth of evidence supporting defendants' counterclaims. At most, Getzel's testimony suggests that defendants may have been subjected to penalties, but he could not identify the penalties and, significantly, the vast majority of his testimony was consistent with Freidman and Dumitru's testimony that defendants were not aware of any audits or tax liabilities that resulted from SKP's services. Moreover, Getzel's testimony concerning penalties constitutes "speculation," which "cannot survive the motion for summary judgment." *Cruz v. 850 Third Ave. Ltd. P'ship*, 186 A.D.2d 4, 6 (1st Dep't 1992). Defendants fail to respond to the portion of SKP's motion that seeks dismissal of the counterclaims. Therefore, as SKP has made a prima facie showing, defendants' counterclaims are dismissed as unopposed.

III. Conclusion

Accordingly, it is hereby

ORDERED that the motion of plaintiff Spielman Koenigsberg & Parker, LLP for summary judgment (motion sequence number 006) is granted to the extent that

defendants' counterclaims are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the motion of defendants Taxi Club Management, Inc. and Evgeny A. Freidman for summary judgment (motion sequence number 007) is granted and the complaint is dismissed; and it is further

ORDERED that the action is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
December 10, 2014

ENTER

Hon. Eileen Bransten, J.S.C.