Pianko v Goetz Fitzpatrick LLP
2016 NY Slip Op 31468(U)
July 28, 2016
Supreme Court, New York County
Docket Number: 154390/2013
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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Maurice Pianko

Plaintiff,

Index No. 154390/2013

-against-

Goetz Fitzpatrick LLP

Defendants

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KALISH, J.:

Upon review of the submitted papers, the Plaintiff's motion for summary judgment is granted as to the Plaintiff's fourth cause of action for an account stated and the Defendant's cross-motion for summary judgment dismissing the Plaintiff's action is granted solely as to the Plaintiff's first and second causes of action as follows:

Background and Procedural History

In the underlying action, the Plaintiff alleges in sum and substance that he was employed by the Defendant as an hourly worker for a period of nearly two years and that the Defendant has failed to pay him approximately $27,072.60 in wages due and owing to him. The Plaintiff alleges that on or around March 7, 2010, he began his employment with the Defendant law firm when he was hired by Ronald Coleman, a former partner of the Defendant law firm. The Plaintiff alleges that for twenty months, he was employed by the Defendant to provide legal work at an agreed upon hourly rate of between $35.00 and $45.00 per hour. As such, the Plaintiff alleges that he was an employee of the Defendant within the meaning of Article Six of the Labor Law. The Plaintiff further alleges that he sent invoices to the Defendant for fees and costs, and that the outstanding sum on said invoices is $27,072.60.

The Plaintiff alleges four causes of action against the Defendant:

- Plaintiff's first cause of action alleges that the Defendant has willfully refused to remit wages that have been lawfully due to the Plaintiff for over two years in violation of New York Labor Law §191. Plaintiff alleges that pursuant to New York Labor Law §195, he is entitled to a judgment against the Defendant in the amount of $27,072.60 plus liquidated damages equal to 100% of the wages due to the Plaintiff including reasonable attorney's fees and prejudgment interest;

- Plaintiff's second cause of action alleges that the Defendant never provided the Plaintiff with the written notices detailing the terms of his employment as required pursuant to New York Labor Law §195. Plaintiff alleges that pursuant to New York Labor Law §198(1-b) he is entitled to a judgment in the amount of $50.00 per week where said violations occurred together with costs and attorney's fees;

- Plaintiff's third cause of action for breach of contract alleges that the Defendant breached its agreement to pay the Plaintiff for services rendered and that the Defendant exacerbated the situation by engaging in a series of bad faith maneuvers for over two years designed to delay said payment. Plaintiff alleges that he is entitled to a judgment against the Defendant in the amount of $27,072.60 for breach of contract;

- Plaintiff's fourth cause of action is for an account stated. Plaintiff alleges that he regularly invoiced the Defendant for the services he provided to the Defendant and the Defendant agreed that it was indebted to the Plaintiff for a total of $27,072.60. The Plaintiff alleges that he is entitled to a judgment against the Defendant in the amount of $27,072.60 plus pre-judgment interest at a rate of 9% from the dates on which the amounts first became due and owing.

The Plaintiff now moves for summary judgment on all of his claims against the Defendant and the Defendant opposes and cross-moves for summary judgment dismissing the Plaintiff's causes of action.

Analysis

Parties' contentions

In support of its motion for summary judgment, the Plaintiff argues that he was employed by the Defendant law firm as a contract attorney for a period of nearly two years. Plaintiff alleges that during this time he provided legal work for the Defendant in connection with two of the Defendant's clients (the "Campmor" matter and the "Tropp" matter respectively). He further argues that he was the Defendant's "employee" as defined by the New York Labor Law. Plaintiff argues that he submitted four invoices for legal work he performed on the Tropp matter and that the Defendant made partial payment to the Plaintiff in the amount of $5,000.00 on the Plaintiff's first invoice, but made no additional payments on

the Tropp invoices. Plaintiff argues that the Defendant owes the Plaintiff $27,072,60 outstanding on the Tropp invoices.

The Plaintiff further argues that he is entitled to judgment as a matter of law on his employment claims. Specifically, the Plaintiff argues that he was an employee of the Defendant law firm, in that the Defendant controlled the means by which the Plaintiff performed his work, including access to legal search engines such as Westlaw and Lexis. Further, the Plaintiff argues that although he performed legal work for the Defendant in connection with the Campmor matter and the Tropp matter, the Plaintiff was never hired by said clients independently, nor did he have a retainer agreement with either of said clients. Plaintiff further argues that the Defendant controlled his work product in that the work he performed was closely reviewed at every stage by the Defendant's senior attorneys, who incorporated his work product into their own. The Plaintiff further argues that at the time of his employment he was not yet admitted to practice law within the State of New York, and that his work was that of a long-term temporary attorney, or first year associate. The Plaintiff argues that the Defendant never entered into a formal written agreement with the Plaintiff as to the work he would be performing for the Defendant, which is counter to the Committee on Professional and Judicial Ethics of the New York City Bar Association's opinion on the subject.

The Plaintiff further argues that pursuant to New York Labor Law §198 (1-a), he is entitled to unpaid wages, all reasonable attorneys fees, prejudgment interest as required under the CPLR and liquidated damages. The Plaintiff argues that the Defendant has no basis for claiming a good faith belief that it was complying with the New York Labor Law and that the Defendant specifically offered the Plaintiff a "bonus".

In the alternative to his employment claims, the Plaintiff argues that he is entitled to summary judgment on his third and fourth causes of action for breach of contract and for an account stated respectively. Specifically, the Plaintiff argues that there is no dispute that a contractual relationship existed between the Parties, that the Plaintiff worked for the Defendant in connection with two of the Defendant's clients' legal matters, that the Plaintiff invoiced the Defendant law firm for his work, and/or that the Defendant only made a partial payment of $5,000.00 on the Plaintiff's first invoice for work performed on the Tropp matter.

The Plaintiff further argues that the Defendant's argument that the Plaintiff was not paid due to Plaintiff's "over billing" is without merit. Specifically, the Plaintiff argues that nowhere in the contemporaneous evidence did the Defendant ever raise any objection to the Plaintiff's invoices, nor is there any proof that the Defendant disputed the Plaintiff's invoices. The Plaintiff further argues that the evidence shows that the Defendant acknowledged that it owed the Plaintiff on the outstanding invoices. The Plaintiff further argues that he is entitled to prejudgment interest on his breach of contract and account stated claim pursuant to CPLR §5001.

In opposition, the Defendant argues that the Plaintiff was not the Defendant's employee as defined by the labor law, but an independent contractor. The Defendant further argues that the Plaintiff formed a corporation in order to bill the Defendant for the legal document review he performed for the Defendant. The Defendant further argues that the Plaintiff was never on the Defendant law firm's payroll, never received a W2 tax form from the Defendant nor did the Plaintiff receive any employee benefits from the Defendant such as health insurance, workers' compensation or unemployment insurance. The Defendant argues that Coleman unilaterally hired the Plaintiff to perform discreet document review assignments on two matters that Coleman was handling. The Defendant further argues in sum and substance that the Plaintiff misrepresented to the Defendant that he was admitted to practice law (Defendant's Affirmation in Opposition p. 7, para 20).

The Defendant further argues that there was no account stated due between the Plaintiff and the Defendant. Specifically, the Defendant argues that the Plaintiff indicated in a November 1, 2011 email to Coleman and the Defendant's "Controller" Di Anna Ganiev that the Plaintiff agreed to accept deferred compensation for the $27,072.60 statement he submitted to the Defendants on October 20, 2010. The Defendant further argues that the Plaintiff orally agreed to enter into a "contingency-bonus fee agreement" with the Defendant. Although the Defendant does not clarify in its opposition papers the specific nature and/or terms of said "contingency-bonus fee agreement", the Defendant's papers suggest that said "contingency-bonus fee agreement" was somehow related to the outcome of an appeal on the Tropp matter in federal court.

The Defendant further claims that the Plaintiff is not entitled to summary judgment on his breach of contract claim as the Plaintiff has failed to establish that the Defendant breached the "contingency-bonus fee agreement" that the Defendant argues existed between the Plaintiff and the Defendant. Specifically, the Defendant argues that the Plaintiff has failed to identify the precise terms of the "contingency-bonus fee agreement". The Defendant further argues that the Plaintiff is unable to prove his alleged damages as he is unable to establish the terms of the "contingency-bonus fee agreement". Finally, the Defendant argues that there are material issues of fact as to the legitimacy of the Plaintiff's billing records for the work performed.

On said bases, the Defendant argues that the Plaintiff is not entitled to summary judgment, and further that the Defendant is entitled to summary judgment dismissing the Plaintiff's entire action.

In reply to the Defendant's opposition, the Plaintiff argues that even assuming arguendo that the "contingency-bonus fee agreement" existed between the Plaintiff and Defendant, the basis for said "contingency-bonus fee agreement" were the invoices, which the Plaintiff submitted to the Defendant for the work he performed on the Tropp matter. The Plaintiff further argues that the "contingency-bonus fee agreement", if it existed, would be unenforceable as an illegal contract. Plaintiff argues that any alleged fee-splitting contract between the Defendant law firm and the Plaintiff would be illegal since he was a

non-attorney at the time he performed legal work for the Defendant.

The Plaintiff further argues that the Defendant never objected to the invoices that the Plaintiff submitted to the Defendant. Specifically, the Plaintiff argues that Coleman's emails to the Plaintiff acknowledge that the Plaintiff was entitled to payment in the amount reflected in the invoices, and that said emails cannot be read as objections to the Plaintiff's invoices. The Plaintiff further argues that even assuming arguendo that Coleman's emails constituted "objections" to the Plaintiff's invoice, said "objections" were untimely. Plaintiff argues that more than eight months passed between the time the Plaintiff submitted the final invoice on the Tropp matter to the Defendant and the date when Coleman communicated the "contingency-bonus fee agreement" to the Plaintiff.

Finally, the Plaintiff reiterates that he has clearly established his entitlement to summary judgment on his breach of contract claim. Specifically, the Plaintiff argues that Coleman admits in his interrogatories that the Plaintiff was at least a contract vendor, and that the Defendant concedes that the Plaintiff was hired by Coleman to perform document review in connection with two legal matters that Coleman was handling. The Plaintiff further points to the deposition testimony of Howard M. Rubin, a partner of the Defendant law firm, whom the Plaintiff argues testified that Plaintiff was not paid due to alleged over-billing and made no mention of the alleged "contingency-bonus fee agreement". The Plaintiff argues in sum and substance that there is no basis from the deposition testimony nor the submitted evidence to conclude that the Plaintiff entered into a "contingency-bonus fee agreement" with the Defendant wherein the Plaintiff effectively "waived" his payment pursuant to the submitted invoices. Plaintiff further argues that he has established that he is owed $27,072.60 outstanding from the Defendant for the work the Plaintiff performed on behalf of the Defendant and Coleman based upon said invoices.

The Plaintiff also attaches with his reply papers an affirmation wherein he refers to an alleged "contingency-bonus agreement". The Plaintiff affirms that he entered into a "vague" unwritten agreement with the Defendant, wherein he would accept delayed payment for the work he performed in the Tropp matter in exchange for a "bonus". The Plaintiff affirms that after months of not being paid for the work he did on the Tropp mater, Ronald Coleman (at the time a partner at the Defendant law firm) offered him a "contingency-bonus agreement". The Plaintiff affirmed that he was never informed that under said agreement he would bear any risk of losing what he was owed for work performed on the Tropp matter. Instead the Plaintiff affirmed that Coleman promised the Plaintiff a "bonus" if he would delay immediate payment on the Tropp matter.

The Plaintiff further states in his affirmation that it was only after years of waiting and the dismissal and subsequent appeal of the Tropp matter, when full payment had not been made to him by the Defendant, did he commence the underlying action. He further states that the proposed "contingency-bonus agreement" was merely an attempt by the Defendant to avoid paying him for the work he performed in the Tropp matter. Plaintiff further affirms that he never represented to the Defendant law firm that he was admitted to practice law prior to the time he was hired by the Defendant to perform legal work, and refers to both his resume and email exchanges he had with Cole, which both indicated his non-admitted status.

Finally, the Plaintiff indicates that he is willing to forgo the "bonus" if the Court awards him summary judgment on his claims against the Defendant law firm.

Oral Argument

On May 24, 2016, the Parties appeared before this Court for oral argument on the instant motion. Plaintiff appeared by counsel and the Defendant appeared by Mr. Rubin, an attorney and partner of the Defendant law firm.[1]

The Plaintiff's counsel argued in sum and substance that the Plaintiff was an "employee" of the Defendant and that the Plaintiff is entitled to summary judgment on his cause of action against the Defendant based upon an account stated. The Plaintiff's counsel's first point was that based upon the level of control that the Defendant had upon the Plaintiff's work, the Plaintiff should be considered the Defendant's "employee" under the "common law test for employment". Specifically, the Plaintiff's counsel argued that the Plaintiff engaged in document review and other legal work for the Defendant under the Defendant's close supervision, and that the Defendant controlled the "means" of the Plaintiff's work. Plaintiff's counsel further argued on this point that there is no factual dispute between the Parties as to the hours the Plaintiff worked or the type of work he did.

On the issue of the account stated, Plaintiff's counsel argued that the Parties do not dispute that the Plaintiff submitted 16 total invoices to the Defendants in connection with the work he performed on the Tropp and Campmor matters, 12 invoices for the Campmor matter and 4 invoices for the Tropp matter. Plaintiff's counsel argued that the Defendant paid the Plaintiff on all of the invoices he submitted for legal work he performed on the Campmor matter and made a partial payment in the amount of $5,000.00 on the first $14,371.35 invoice that the Plaintiff submitted to the Defendant on the Tropp matter. Plaintiff's counsel further indicated that the Plaintiff was directly hired by Mr. Coleman, who was a partner a the Defendant law firm at the time. Plaintiff's counsel indicated that the invoices that the Plaintiff submitted to the Defendant on the Tropp matter totaled $34,072.60, which minus the Defendant's $5,000.00 partial payment, left an outstanding balance of $27,072.60. Plaintiff's counsel

[1] As previously stated in the instant decision, Mr. Rubin is a current partner of Goetz Fitzpatrick, LLP. Mr. Rubin also appeared for deposition on behalf of Goetz Fitzpatrick, LLP and submitted an affirmation in opposition to the Plaintiff's motion for summary judgement. The Court recognizes that Mr Rubin is a practicing attorney and that he appeared at oral argument as a representative of said law firm. The Court will treat Mr. Rubin's representations at oral argument as the Defendant's representations unless otherwise specifically indicated to the contrary.

further argued that the Defendant did not reject any of the Plaintiff's submitted invoices on the Tropp matter.

Further, Plaintiff's counsel described the "contingency-bonus fee agreement" as an oral understanding the Plaintiff had with Coleman that if the Plaintiff would allow the Defendant to defer payment of the $27,072.60 until the resolution of the appeal on the Tropp matter, the Defendant would pay the Plaintiff said amount plus a "bonus". However, Plaintiff's counsel indicated that there were no email communications between the Plaintiff and Coleman as to the specifics of the "contingency-bonus fee agreement" or the exact nature/amount of the "bonus". Plaintiff's counsel argued in sum and substance that the Defendant acknowledged that the Plaintiff was owed $27,072.60 for the work he did on the Tropp matter based upon his submitted invoices and that the Defendant made a partial payment of $5,000.00 on the first of said submitted invoices. Plaintiff's counsel further emphasized Mr. Rubin's deposition, wherein he testified that the Plaintiff was not paid do to "over billing" and made no mention of the "contingency-bonus fee agreement".

The Plaintiff's counsel further argued that there was no question that the Defendant was aware of the Plaintiff's status as a non-admitted attorney at the time they hired him. Given that the Plaintiff was not yet admitted, the Plaintiff's counsel argued that it would not be "ethically permitted" for the Defendant law firm to enter into any sort of "contingency-bonus fee agreement" with the Plaintiff, wherein the Plaintiff's payment for work performed on the Tropp matter was dependant upon the ultimate outcome of said matter. As such, Plaintiff's counsel argued that the Parties understood that the Plaintiff was entitled to the outstanding $27,072.60 based upon his submitted invoices, and any "contingency-bonus fee agreement" would have been unethical and unenforceable.

In opposition, the Defendant argued in sum and substance that in early 2011, the Parties had an understanding that the Defendant was not going to pay the Plaintiff based upon the invoices the Plaintiff submitted in the Tropp matter, and that payment was going to be delayed until the appeal of said case was resolved. The Defendant argued that based upon the email communications between Coleman and the Plaintiff, the Parties agreed that the Plaintiff's bills were not due and owing and that they would be paid "on some other contingency-type bonus". The Defendant further argued in sum and substance that the "contingency-bonus fee agreement" between the Parties meant that any "payment" the Plaintiff might receive for the work he performed in connection with the Tropp matter would be contingent upon the ultimate outcome of said matter. Specifically, that the Plaintiff would be paid on a contingency basis based upon the outcome of the appeal in the Tropp matter, which according to Defendant's attorney is still ongoing. The Defendant argued in sum and substance that the Plaintiff agreed to forego his hourly rate and instead agreed to a "contingency" fee based upon the outcome of the appeal in the Tropp matter. The Defendant was unable to give the specific terms of the "contingency-bonus fee agreement", but argued that the specific terms of the "contingency-bonus fee agreement" were issues of fact. The Defendant further indicated that he did not know that the Plaintiff was not an admitted attorney at the time he was hired by Coleman. However, the Defendant did concede that at the time Coleman hired the Plaintiff, Coleman was a partner at the Defendant law firm and acted on behalf of the Defendant law firm. The Defendant further argued that the billing invoices that the Plaintiff submitted to the Defendant were made in the name of a corporation "Aycrigg" and not in the Plaintiff's name. The Defendant argues that Aycrigg is not a party to the underlying action.

Summary Judgment Standard

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc., 96 AD3d 551, 553 (NY App Div 1st Dept 2012) [internal quotation marks and citation omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (id.). "Once this showing has been made, 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]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted)). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978); Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 (NY App Div 1st Dept 2002)).

There is no issue of fact as to whether or not the Defendant was aware of the Plaintiff's status as a non-admitted attorney at the time the Defendant Law Firm hired the Plaintiff to perform legal work.

As an initial matter, the Court finds that the Plaintiff has established prima facie that the Defendant law firm was aware that the Plaintiff was not admitted to practice law in the State of New York when the Defendant hired him to perform document review and other legal work. Mr. Rubin, a partner at the Defendant law firm, indicated at oral argument that he was not personally aware that the Plaintiff was not admitted to practice law in the State of New York. However, Mr. Rubin acknowledged that at the time Coleman hired the Plaintiff, Coleman was also partner at the Defendant law firm and that Coleman acted on behalf of the Defendant in hiring the Plaintiff to perform legal work. The Plaintiff attaches with his moving papers a copy of an email he sent to Coleman prior to being hired, wherein the Plaintiff specifically stated that his "NJ bar admission is pending". Said email is consistent with the Plaintiff's deposition testimony that he informed Coleman of the Plaintiff's status as a non-admitted attorney. Further, the Defendant does not allege that Coleman was unaware of the Plaintiff's status as a

non-admitted attorney, nor does the Defendant at any point argue that Coleman was not acting as a partner of the Defendant law firm and on behalf of the Defendant Law firm when he hired the Plaintiff to perform legal work for the Defendant. That Mr. Rubin, another partner of the Defendant law firm, may not have been personally aware that the Plaintiff was not an admitted attorney at the time he was hired to work for the firm, does no take away from the fact that Coleman was aware of the Plaintiff's status when he hired the Plaintiff on behalf of the law firm.

As such, the Court finds that the Plaintiff has established prima facie that the Defendant law firm was aware that he was an un-admitted attorney at the time it hired him to perform legal work, and that the Defendant has failed to create an issue of fact on this point.

The Defendant is entitled to summary judgment dismissing the Plaintiff's first and second causes of action under the labor law as the Plaintiff was not an employee of the Defendant law firm

"The definition of 'employee' included in Labor Law 190(2) 'excludes independent contractors.' The inquiry is fact sensitive and often presents a question for the trier of fact." (Thomas v Meyers Assoc., L.P., 39 Misc 3d 1217(A), 1217A (NY Sup Ct NY Cnty 2013) citing Akgul v Prime Time Transp., Inc., 293 AD2d 631 (NY App Div 2d Dept 2002); Bynog v Cipriani Group, Inc., 1 NY3d 193 (NY 2003); Bermudez v Ruiz, 185 AD2d 212 (NY App Div 1st Dept 1992); Carrion v Orbit Messenger, 192 AD2d 366 (NY App Div 1st Dept 1993) affd 82 NY2d 742 (NY 1993); Sandrino v. Michaelson Assocs., LLC, 2012 U.S. Dist. LEXIS 165143 (SDNY Nov. 19, 2012). Article 6 of the Labor Law governs employers' payment of wages and benefits to employees. "The critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results. Factors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule" (Bynog v Cipriani Group, Inc., 1 NY3d 193 (NY 2003) citing In re Ted Is Back Corp., 64 NY2d 725 (NY 1984); In re 12 Cornelia Street, Inc., 56 NY2d 895 (NY 1982); In re Morton, 284 N.Y. 167, 172 (N.Y. 1940); Lazo v Mak's Trading Co., 84 NY2d 896 (NY 1994); Bhanti v Brookhaven

Mem'l Hosp. Med. Ctr., 260 AD2d 334 (NY App Div 2d Dept 1999)).

"The distinction between an employee and an independent contractor has been said to be the difference between one who undertakes to achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished, and one who agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are used. (In re Morton, 284 NY 167, 172 (NY 1940)). "The determination of whether one is an independent contractor typically involves a question of fact concerning which party controls the methods and means by which the work is to be done. However, where the proof on the issue of control presents no conflict in evidence the matter may properly be determined by the court as a matter of law" (Lazo v. Mak's Trading Co., 199 A.D.2d 165, 166 (NY App Div 1st Dept 1993) affd 84 NY2d 896 (NY 1994) (citations omitted)).

Upon review of the submitted papers and having conducted oral argument, the Court finds as a matter of law that Plaintiff was an independent contractor employed by the Defendants and not an "employee" pursuant to the New York Labor Law. In the underlying action there is no dispute that the Plaintiff was not on the Defendant law firm's payroll nor did the Plaintiff receive any of the fringe benefits or health insurance that the Defendant's employees received. Further, the Plaintiff has not submitted any proof to establish prima facie that he was not allowed to engage in other employment while he was working for the Defendant law firm. Finally, although the Defendant had ultimate control over the Plaintiff's work product, there is no indication that the Plaintiff worked on a fixed schedule. For the foregoing reasons the Court finds, as a matter of law that the Plaintiff was an independent contractor employed by the Defendant Law firm and not a "employee" of the Defendant law firm pursuant to the Labor Law.

As such, the Defendant has established prima facie that it is entitled to summary judgment dismissing the Plaintiff's first and second causes of action, which both hinge upon the Plaintiff's assertion that he was an "employee" of the Defendant law firm pursuant to the Labor Law, and the Plaintiff has failed to create an issue of fact in opposition to the Defendant's cross-motion on this point.

For these same reasons, the Plaintiff has failed to establish prima facie that he was an "employee" of the Defendant pursuant to the Labor Law.

Accordingly, the Plaintiff's motion for summary judgment is denied as to his first and second causes of action, and the Defendant's cross-motion for summary judgment is granted to the extent that the Plaintiff's first and second causes of action are hereby dismissed.

The Plaintiff' is entitled to summary judgment on his fourth cause of action for an account stated.

"'An account stated is an agreement, express or implied, between the parties to an account based upon prior transactions between them with respect to the correctness of account items and a specific balance due on them' which is 'independent of the original obligation.' A cause of action for an account stated has been described as 'an alternative theory of liability to recover the same damages allegedly sustained as a result of the breach of contract'" (Episcopal Health Servs., Inc. v POM Recoveries, Inc., 138 A.D.3d 917, 919 (NY App Div 2d Dept 2016) citing Citibank (South Dakota) N.A. v Cutler, 112 AD3d 573 (NY App Div 2d Dept 2013); A. Montilli Plumbing & Heating Corp. v Valentino, 90 AD3d 961 (NY App Div 2d Dept 2011). "An essential element of an account stated is that the parties came to an agreement with respect to the amount due. '[W]hile the mere silence and failure to object to an account stated cannot be construed as an agreement to the correctness of the account, the factual situation attending the particular transactions may be such that, in the absence of an objection made within a reasonable time, an implied account stated may be found'" (Episcopal Health Servs., Inc. v POM Recoveries, Inc., 138 AD3d 917 (NY App Div 2d Dept 2016) quoting Interman Industrial Products, Ltd. v R. S. M. Electron Power, Inc., 37 NY2d 151 (NY 1975)).

A plaintiff establishes its prima facie right to summary judgement on an account stated claim by establishing "[e]ither retention of bills without objection or partial payment." (Morrison Cohen Singer & Weinstein, LLP v Waters, 13 AD3d 51, 52 (NY App Div 1st Dept 2004); Kucker & Bruh, LLP v Sendowski, 136 AD3d 475 (NY App Div 1st Dept 2016); see also Joseph W. Ryan, Jr., P.C. v Faibish, 136 AD3d 984 (NY App Div 2d Dept 2016)).

To raise an issue of fact on a cause of action for an account stated, an objection must be related to a "specific amount or invoice" (See Schulte Roth & Zabel, LLP v Kassover, 80 AD3d 500, 501 (NY App Div 1st Dept 2011) lv denied 17 NY3d 702 (NY 2011); see also Bartning v Bartning, 16 AD3d 249 (NY App Div 1st Dept 2005)).

The Plaintiff attaches with his moving papers four invoices that he submitted to the Defendant in connection with the work he performed on the Tropp matter and twelve invoices he submitted for work he performed on the Campmor matter. Every single one of said invoices includes the Plaintiff's name and indicates that it is being billed to the Defendant law firm Goetz Fitzpatrick, LLP. The invoices also include Mr. Coleman's name under Goetz Fitzpatrick, LLP. Further, in the instant action the Defendant does not dispute that the Plaintiff was retained to perform legal work for the Defendant in connection with both the Campmor and Tropp matters or that the Plaintiff sent the Defendant multiple invoices requesting payment for said legal work. Neither is there any dispute that the Defendant paid the Defendant in full for the legal work he completed on the Campmor matter based upon the invoices he submitted to the Defendant on said matter. Further, the Defendant does not dispute that it made a partial payment to the Plaintiff in the sum of $5,000.00 on the first invoice the Plaintiff submitted on the Tropp matter, nor does the Defendant dispute that it failed to make any additional payments to the Plaintiff on the Tropp matter, and there is no dispute that the Defendant received all four of the Plaintiff's invoices on the Tropp matter.

Accordingly, based upon the fact that Plaintiff was retained by the Defendant to perform legal work on both the Campmor and Tropp matters, the fact that the Plaintiff submitted invoices to the Defendant for the work he performed on both of these matters, the fact that the Defendant paid the Plaintiff on all twelve of the Campmor invoices and made a partial payment of $5,000.00 to the Plaintiff on his first invoice submitted for work done in the Tropp matter, the Court finds that the Plaintiff has established prima facie that he is entitled to summary judgment against the Defendant on his fourth cause of action for an account stated.

The Court further finds that the Defendant has failed to create an issue of fact on this point. The Defendant's opposition hinges upon its argument that it entered into a "contingency-bonus fee agreement" with the Plaintiff, wherein the Plaintiff effectively agreed to waive being paid in accordance with his submitted invoices in lieu of making his compensation entirely contingent upon the outcome of the appeal in the Tropp matter. However, the Defendant has been unable to present the Court with any specific agreement between the Parties to this effect. The Defendant has been equally unable to describe the specific terms of any such agreement beyond a vague description that the Plaintiff's compensation would being entirely contingent upon the outcome of the Tropp appeal with the possibility of a "bonus".

The Defendant's argument on this point is based entirely upon a series of email exchanges between the Plaintiff and Mr. Coleman (acting as a partner of the Defendant law firm). However, at no point in said emails did Mr. Coleman ever indicate that the Defendant was rejecting or in any way challenging the payments requested in the Plaintiff's invoices. In point of fact, Mr. Coleman specifically indicates in several of the emails that the Defendant owed the Plaintiff the outstanding balance on the invoices for the legal work the Plaintiff performed on the Tropp matter. At most, the email exchanges between the Plaintiff and Mr. Coleman reflect an "agreement" that the Plaintiff would allow the Defendant to delay paying him for the work he had completed, pending the outcome of the Tropp matter in exchange for an undefined "bonus" when the Tropp matter was concluded. There is nothing in the email exchanges between the Plaintiff and Mr. Coleman (acting as a partner of the Defendant law firm)

to constitute a rejection/objection to the Plaintiff's submitted invoices on the Tropp matter, nor is there any indication from said emails that the Plaintiff agreed to accept any payment less than the outstanding amount on his submitted invoices. Further, there is no basis from said emails to remotely suggest that the Plaintiff, in sum and substance, waived payment on his invoices in exchange for an undefined "contingency-bonus fee agreement" wherein his potential compensation would be entirely based upon the outcome of the Tropp matter. The Defendant's argument that the Plaintiff would agree to give up payment based upon his submitted invoices in exchange for a "contingency-bonus fee agreement" wherein his entire compensation hinged upon the outcome of the Tropp matter is without basis, in particular given that the Defendant is unable to provide the Court with any specific description of the terms of said "contingency-bonus fee agreement".

Furthermore, Mr. Rubin's testimony at his deposition in no way suggests that the Parties agreed to enter into any "contingency-bonus fee agreement" as to the Plaintiff's pay or that the Defendant did not pay the Defendant on his submitted invoices based upon the alleged "contingency-bonus fee agreement". In point of fact, at no point in his deposition does Mr. Rubin ever even refer to any sort of "agreement" between the Plaintiff and the Defendant as to what the Defendant was entitled to for the legal work he preformed, apart from the Plaintiff's invoices. Mr. Rubin testified in sum and substance that the reason the Defendant did not pay the Plaintiff for the legal work he performed is that Mr. Rubin felt that the Plaintiff "over-billed" the Defendant law firm. However, at no point in his deposition testimony did Mr Rubin indicates that he or anyone from the Defendant law firm communicated any such "rejection" to the Plaintiff's submitted invoices.

The Court further notes that the plain meaning of the word "bonus" as it is regularly used refers to an amount "in addition to" a set or base amount. It does not refer to a "replacement amount" or an "amount in lieu of". As such, the Defendant's reference to the alleged "contingency-bonus fee agreement" as a "bonus" supports the Plaintiff's argument that any such agreement was for an amount that the Plaintiff would be paid "in addition to" what he was still owed on his invoices. Clearly the

Defendant offered the additional "bonus" to the Plaintiff so that he would accept a delayed payment of the outstanding $27,072.60, not to replace the outstanding $27,072.60.

In addition, although the Defendant law firm indicated to the Court at oral argument that the Tropp measure is still ongoing, in that there is an on-going appeal, the Defendant has submitted no proof to the Court to this effect. Further, to the extent that it existed, the Plaintiff agreed to the "contingency-bonus fee agreement" to accept a delayed payment of the outstanding $27,072.60 with the "bonus" in 2011. It is now 2016, five years later and the Defendant has given no indication as to how long the Tropp matter will remain "on going". Further, the Defendant has submitted no proof to the Court to show that at any point during the last five years it ever informed the Plaintiff as to the status of the Tropp matter and/or any indication as to when it would be "concluded" for the purpose of paying the Plaintiff for the work he performed on the matter, or that at any point during the last five years, the Plaintiff agreed to any further delay by the Defendant in paying him what he was owed. The Plaintiff's instigation of a lawsuit five years after his payment became due and owing clearly indicates that he was demanding payment and was not agreeing to any further delays.

The Court further notes that the Plaintiff has specifically indicated in his affirmation, even if there was an "agreement" between the parties, that he is now willing to forgo the "bonus" addressed in the emails between himself and Mr. Coleman if he is granted summary judgment on his causes of action. As such, the Plaintiff has effectively waived any claim he may have had that was predicated upon the alleged "contingency-bonus fee agreement", if the Court should decide the underlying action in his favor as to the outstanding $27,072.60 on the invoices he submitted to the Defendant for work he performed on the Tropp matter.

Even assuming arguendo that the Defendant had offered to enter into a "contingency-bonus fee agreement" with the Plaintiff, said offer did not constitute a timely objection to the Plaintiff's submitted invoices.

Even assuming arguendo that the Defendant had offered to enter into a "contingency-bonus fee agreement" with the Plaintiff, said "offer" was not made until a significant amount of time following the Defendant's acceptance of the Plaintiff's invoices. The Plaintiff's last submitted invoice on the Tropp matter was dated September 19, 2010, while the first email wherein Coleman suggests an alternative "proposal" (ostensibly the alleged "contingency-bonus fee agreement") is dated May 24, 2011, over eight months later. In essence, the Defendant received all four of the Plaintiff's invoices on the Tropp matter, made a $5,000.00 partial payment on the first invoice, repeatedly emailed the Plaintiff over the next eight months indicating that it recognized that Plaintiff was entitled to the outstanding balance, and then allegedly proposed a vague "contingency-bonus fee agreement". Said actions cannot be read as a timely rejection of the Plaintiff's invoices. To the contrary, they clearly reflect the Defendant's acceptance of the Plaintiff's invoices for work completed on the Tropp matter, and a recognition that the Plaintiff was entitled to payment for the outstanding amount on said invoices.

Finally, the Court finds the Defendant's argument that the invoices were prepared on behalf of a non-party corporation Aycrigg LDA, Inc. and not the Plaintiff to be entirely without merit. The Defendant does not dispute that it hired the Plaintiff to perform legal work for the Defendant in connection with the Tropp matter. Neither does the Defendant dispute that the invoices were submitted in connection with the work the Plaintiff performed on the Tropp matter. In point of fact, although the invoices do include the Aycrigg LDA, Inc. on their headings, they each also clearly identify the Plaintiff "Maurice S, Painko" by name. As such, it is clear that the Defendant was fully aware that the Plaintiff, Mr. Pianko was submitting the invoices for work that he completed for the Defendant in connection with the Tropp matter. To now require the Plaintiff to add Aycrigg LDA, Inc. as a Plaintiff in the underlying action in order to recover on what is clearly an account stated for legal work the Plaintiff completed for the Defendant would be putting form over substance.

As such the Defendant is entitled to summary judgement on his fourth cause of action for an account stated.

Having granted the Plaintiff's motion for summary judgment on his fourth cause of action for an account stated, the Court need not address the Plaintiff's motion for summary judgement on his third cause of action for breach of contract.

Plaintiff is entitled to statutory prejudgment interest to be calculated from the date of the Plaintiff's May 2, 2016 affirmation in reply to the Defendant's opposition

Finally, this Court has the authority to assess prejudgment interest against the Defendant on the Plaintiff's cause of action for an account stated (See RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 AD3d 618 (NY App Div 1st Dept 2009); Healthcare Capital Mgmt. LLC v. Abrahams, 300 AD2d 108 (NY App Div 1st Dept 2002) citing Kramer, Levin, Nessen, Kamin & Frankel v Aronoff, 638 F. Supp. 714 (SDNY 1986)).

The Plaintiff states in his affirmation that he did agree to the Defendant's delay in paying him (in exchange for a vague "bonus" on top of the $27,072.60 that was due and owing to him) and that he commenced the underlying action when it became clear to him that the Defendant would not pay him said $27,072,60. However, the Plaintiff did not indicate that he was willing to forgo any "bonus" under the alleged "contingency-bonus fee agreement" until his reply affirmation dated May 2, 2016 submitted in the instant motion. As such, the Court finds that the Plaintiff is entitled to interest calculated on the sum of $27,072.60 measured at the statutory rate from May 2, 2016.

Conclusion

Accordingly and for the reasons so stated it is hereby

ORDERED that the Plaintiff's motion for summary judgment is hereby granted to the extent that Plaintiff is entitled to a judgement in his favor in his fourth cause of action against the Defendant for an account stated in the sum of $27,072.60 with statutory prejudgment interest calculated from May 2, 2016. It is further

ORDERED that the Defendant's cross-motion for summary judgment is granted solely as to dismissing the Plaintiff's first and second causes of action and is otherwise denied. It is further

ORDERED that the Clerk is directed to enter judgment in favor of the Plaintiff against the Defendant in the sum of of $27,072.60 with statutory prejudgment interest calculated from May 2, 2016, plus costs and disbursement as taxed by the Clerk.

The foregoing constitutes the ORDER and DECISION of the Court.

Dated: July 28, 2016

ENTER:

, JSC

HON. ROBERT D. KALISH