Creditor, Goldweber Epstein LLP v Schrank
2016 NY Slip Op 31906(U)
September 27, 2016
Supreme Court, New York County
Docket Number: 153403/16
Judge: Kathryn E. Freed
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2
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CREDITOR,
GOLDWEBER EPSTEIN LLP,

Plaintiff,

-against-

DECISION/ORDER
Index No.: 153403/16
Seq. No.: 001

DEBTOR,
JOSEPH SCHRANK,

Defendant.
--X
HON. KATHRYN E. FREED:

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

PAPERS	NUMBERED
AMENDED NOT. OF MOT. AND AFF. ANNEXED	1-2 (Exs. A-G)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Plaintiff creditor Goldweber Epstein LLP, a law firm, moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint in the amount of $38,382.89, the amount of outstanding legal fees allegedly owed by its client, defendant debtor Joseph Schrank. Defendants do not oppose the motion. After a review of the papers, and after a review of the relevant statutes and case law, the motion is **denied.**

FACTUAL AND PROCEDURAL BACKGROUND:

On or about December 27, 2012, defendant Joseph Schrank executed a retainer agreement ("the agreement") with the plaintiff law firm, Goldweber Epstein LLP. Ex. D. Pursuant to the agreement, defendant agreed to represent plaintiff "regarding [p]ost-[j]udgment custody and access"

of his son ("the custody proceeding"). Ex. D. The agreement also provided, inter alia, that plaintiff charged $510 per hour for partners, $275-400 for associates, and $125 per hour for paralegals; that defendant agreed to pay a $10,000 retainer, which was to be replenished when it reached $2,500; that bills would be submitted by plaintiff to defendant at least every 60 days, that defendant had 30 days to object to the bills, and that if defendant did not object to the bills, plaintiff would assume that they were acceptable; and that defendant was entitled to arbitrate any fee dispute with plaintiff. Id.

During the course of the custody proceeding, plaintiff sent regular itemized invoices to defendant at least every 60 days. Aff. In Supp., at par. 8. During the course of the custody proceeding, defendant made several legal fee payments to plaintiff. Aff. In Supp., at par. 9. In December of 2014, this Court (Sattler, J.) rendered its final decision in the custody proceeding. Ex. C. Defendant then forwarded to plaintiff its final invoice, reflecting an accrued balance of $37,341.77. Ex. E. Defendant did not pay this invoice and, after additional charges were incurred, the total of the February, 2015 invoice was $38,382.89. Ex. F. No payments have been made by defendant since November 18, 2014. Aff. In Supp., at par. 11.

On April 13, 2015, plaintiff sent defendant a notice stating that he had the opportunity to arbitrate the fee dispute. Ex. G. However, defendant did not respond.

Plaintiff now moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint, seeking to recover $38,382.89, the amount owed by defendant for legal fees, plus interest from February 27, 2015, the date of its last invoice.[1]

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[1]Plaintiff initially moved by notice of motion filed April 25, 2015. *See* NYSCEF Doc. No. 2. An amended notice of motion was filed on June 2, 2015. *See* NYSCEF Doc. No. 11.

PLAINTIFF'S CONTENTIONS:

Plaintiff argues that it is entitled to summary judgment in lieu of complaint in the amount of $38,382.89, plus interest from February 27, 2015, the date of the last invoice, since that is the amount owed to plaintiff by defendant for legal fees incurred by defendant in the custody proceeding. It asserts that a motion for summary judgment in lieu of complaint can be granted where an action is based upon an instrument for the payment of money only and that here, the retainer agreement, signed by defendant, combined with the legal invoices sent to defendant by plaintiff, constitute such an instrument.

Defendant does not oppose the motion.

CONCLUSIONS OF LAW:

Procedural Issues:

A motion for summary judgment in lieu of complaint is governed by the same standards as a motion for summary judgment brought pursuant to CPLR 3212. *See Gateway State Bank v Shangri-La Private Club for Women, Inc.*, 113 AD2d 791 (2d Dept 1985). A movant's service of a summons and motion pursuant to CPLR 3213 requires a defendant to serve answering papers by the time set forth in the notice of motion, and "the minimum amount of time the plaintiff must give the defendant to appear and oppose the motion is dependent upon the date and method of service" which is calculated pursuant to CPLR 320. *Goldman v Saltzman*, 13 Misc3d 1023, 1025 (Sup Ct Nassau County 2006). Plaintiff has the burden of establishing, inter alia, that defendant was properly served with the motion. *See Cadle Co. v Ayala*, 47 AD3d 919 (2d Dept 2008).

According to an affidavit of service dated July 12, 2016,[2] the process server, James Edmond, personally served defendant with the "Summons with Notice, Notice of Motion for Summary Judgment in Lieu of Complaint, Request for Judicial Intervention, Notice of Commencement of Action Subject to Mandatory Electronic Filing, and Amended Notice of Motion for Summary Judgment in Lieu of Complaint" on June 7, 2016. Although this Court checked the efiled documents on this case, as it is permitted to do (*see, Matter of Moynihan*, 120 AD3d 1029, 1041 n 1 [1st Dept 2014]), the affidavit of service was not efiled with this Court, as required by 22 NYCRR 202.5-bb(a)(1) and (c)(1). Nor was there a stamp on the affidavit of service indicating that it was received by the Clerk's office. Thus, there is no proof on record with this Court that defendant was served with plaintiff's motion.

Given that no affidavit of service was filed with this Court, and thus the minimum amount of time defendant needed to be given to respond to the motion cannot be ascertained, this Court lacks the jurisdiction to hear the motion, it must be denied without prejudice and the action must be dismissed. *See Goldstein v Saltzman*, 13 Misc3d *supra* at 1027, citing *National Bank of Canada v Skydell*, 181 AD2d 645 (1st Dept 1992).

Even assuming, arguendo, that the affidavit of service had been properly filed, this Court would still be constrained to deny plaintiff's motion. This is because the affidavit of service fails to state that defendant was served with the affidavit of plaintiff's counsel in support of the motion. Since defendant was not served with a complete set of motion papers, plaintiff failed to establish proper service of the motion in this respect as well. *See Cadle Co. v Ayala*, *supra*.

Further, the motion must be denied on the ground that the affidavit proffered by plaintiff's attorney, Elyse S. Goldweber, Esq., is deficient. Although an attorney is permitted to submit an

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[2]This affidavit of service was found as a loose sheet of paper in the court file.

affirmation in support of a motion, he or she may not do so if he or she is a party to the action. CPLR 2106. In such case, such as here, the attorney must submit an affidavit. Id. Here, since counsel's proffered affidavit is neither sworn nor notarized, it is in improper form and is cannot be considered by this Court. *See Matter of Sassower v Greenspan, Kanarek, Jaffe & Funk*, 121 AD2d 549 (2d Dept 1986) (papers submitted in the form of an affirmation by a party who is an attorney may be disregarded by court).

Substantive Issues:

Even if the motion were procedurally proper, it would be denied on its merits. CPLR 3213 provides that a motion for summary judgment in lieu of a complaint may be served by plaintiff "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment." Such a motion is designed to provide

> "an effective means of obtaining an accelerated judgment where a defendant's liability for a certain sum of money is clearly established by the instrument, coupled with proof of nonpayment." *Wagner v Cornblum*, 36 AD2d 427, 428 (4th Dept 1971); *see also Holmes v Allstate Ins. Co.*, 33 AD2d 96, 98 (1st Dept 1969). "A plaintiff makes out a prima facie case for summary judgment in lieu of complaint by proof of an instrument and the defendant's failure to make payment according to its terms." *Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136 (1st Dept 1968), affd, 29 NY2d 617 (1971). The device of summary judgment in lieu of complaint is unavailable "where there are other issues and considerations presented by the writing." *Kerin v Kaufman*, 296 AD2d 336, 337 (1st Dept 2002); *see also Weissman v Sinorm Deli, Inc.*, 88 NY2d 437 (1996).

Emery Celli Brinkerhoff & Abady, LLP v Rose, 2010 N.Y. Misc LEXIS 5821 (Sup Ct New York County 2010).

Here, this Court finds that plaintiff failed to establish its prima facie entitlement to summary judgment in lieu of complaint. Where an "account stated is consonant with the fixed terms of [an]

agreement, this may be taken as an obligation warranting the accelerated procedure under CPLR 3213, especially where the rendering of statements in connection with that account indicates a history of transactional activity (*citations omitted*)." *Rhee v Meyers*, 162 AD2d 397, 398 (1st Dept 1990). No such obligation arose here, however, since the agreement did not set forth fixed terms for payments by defendant. Rather, the amount of the payments differed based on the work performed by plaintiff. Further, plaintiff's counsel does not represent how or when the invoices were sent to defendant and the invoices do not contain an email or mailing address of the defendant.

In asserting that the legal invoices and retainer agreement, taken together, constitute an instrument for the payment of money only, plaintiff relies on *Barraco v Rosendale*, 162 AD2d 899 (3rd Dept 1990), which is clearly distinguishable. In that matter, the court held that summary judgment in lieu of complaint could be used to recover legal fees based on a signed letter from the defendant client to an escrow agent acknowledging that the attorney's final bill was accurate and authorizing the escrow agent to pay the amount owed to a principal of the law firm. In contrast, defendant here has made no such written acknowledgment that he owes a certain amount of money to defendant.

To the extent plaintiff relies on *Courten & Villar PLLC v Alcosser*, 38 Misc3d 1206(A) (Co. Ct. Suffolk County 2013), that case is inapposite herein, as the issue before the court in that matter was whether the fees charged by the attorney were reasonable.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Goldweber Epstein LLP for summary judgment in

lieu of complaint pursuant to CPLR 3213 is denied, and the action is dismissed without prejudice; and it is further,

ORDERED that this constitutes the decision and order of the court.

DATED: September 27, 2016

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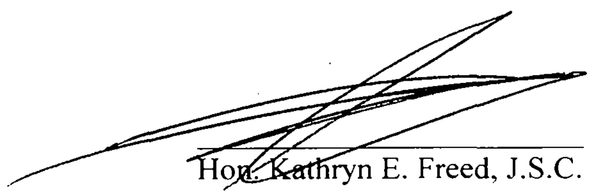

Hon. Kathryn E. Freed, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT