

<b>Carter Ledyard &amp; Milburn LLP v Wyckoff</b>
2018 NY Slip Op 30818(U)
May 3, 2018
Supreme Court, New York County
Docket Number: 156284/2016
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 32

-----X  
CARTER LEDYARD & MILBURN LLP,

Plaintiff,

**DECISION**  
**Index No. 156284/2016**

-against-

Mot. Seq. 001

ELIZABETH WYCKOFF, individually and as Executrix  
of the estate of E. Lisk Wyckoff, deceased

Defendant.

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The motion by plaintiff for summary judgment on its complaint is granted and the cross-motion to dismiss the complaint is denied.

**Background**

This attorneys' fees case arises out of plaintiff's representation of defendant in connection with an investigation by the New York State Attorney General ("AG"). The AG was investigating potential illegal acts committed at a charity run by defendant called the Homeland Foundation. Defendant became president of the Homeland Foundation on December 6, 2012 a few days after her husband passed away.

Defendant claims she found out about the AG's investigation in June 2013 and notified the insurance company, Hiscox Insurance Company ("Hiscox"), that held Homeland's Officer and Director's Policy. Defendant contends that she was informed by Homeland's counsel that she needed separate counsel.

In August 2013, defendant hired plaintiff to represent her. On September 1, 2015, an Assurance of Discontinuance (“AOD”) was reached with the AG. The AOD included *inter alia* a requirement that defendant sever all connections with the Homeland Foundation. Plaintiff contends that after the AOD was signed, plaintiff continued to represent defendant in order to effectuate the terms of the AOD, respond to inquiries from the AG and from the Homeland Foundation.

Plaintiff sent a letter to defendant in October 2015 in which defendant was informed that the insurance policy would not cover legal fees incurred after the AOD (after September 1, 2015) and that “to the extent [the invoices] are not paid, the charges we have been billing to Hiscox are ultimately your responsibility” (NYSCEF Doc. No. 27). Plaintiff also informed defendant in February 2016 that there was a balance left over from legal fees Hiscox declined to pay prior to the AOD. Plaintiff contends that it represented defendant until July 2016.

Plaintiff now moves for summary judgment seeking to recover outstanding fees it claims it is owed. Throughout its representation of defendant, the vast majority of the fees charged by plaintiff were paid by Hiscox. Plaintiff now seeks to recover the remaining fees— totaling \$78,671.32. This total includes \$49,936.03 not paid by Hiscox prior to the AOD and \$28,773.29 constituting work done after the AOD.

Defendant cross-moves to dismiss claiming that it was her understanding that all legal fees would be covered by Hiscox and that she has no obligation to pay the outstanding legal fees charged by plaintiff. Defendant claims that plaintiff never told her that she would be liable if Hiscox chose not to pay certain bills.

Plaintiff claims that defendant was on notice that she was ultimately responsible for the fees incurred while being represented by plaintiff. Plaintiff contends that it tried to have its fees paid by Hiscox in the first instance, but that does not mean defendant is absolved of her obligation to pay.

### Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *aff’d* 99 NY2d 647, 760 NYS2d 96 [2003]).

**Scope of Plaintiff's Representation of Defendant**

It is undisputed that plaintiff represented defendant in connection with the AG's investigation. The central question of the instant motion is the scope of that representation. Defendant insists that plaintiff only represented her to the extent that Hiscox paid plaintiff's legal fees. That position is untenable.

The engagement letter sent by plaintiff to defendant states that plaintiff "will represent you in your capacity as an officer and Trustee of the Homeland Foundation and in your capacity as the Executrix of the Estate of E. Lisk Wyckoff, Jr." (NYSCEF Doc. No. 22). The letter does not mention Hiscox whatsoever. And a letter sent from Hiscox to defendant, dated September 3, 2013, notes that Hiscox "agrees to advance Defense Costs for this matter consistent with our obligations . . . subject to currently known information and a full reservation of rights as detailed below" (NYSCEF Doc. No. 25 at 1). This letter also details specific exclusions for which Hiscox might not cover defense costs (*see id.* at 2-3).

These two documents, when taken together, clearly show that plaintiff was retained by defendant to represent *her* while the AG was investigating improprieties in the Homeland Foundation. There is no basis to hold that an attorney-client relationship formed where plaintiff would cover defendant only for legal work covered by insurance.

Moreover, the invoices created by plaintiff were regularly sent to defendant by Ms. Liu, a legal secretary for plaintiff (NYSCEF Doc. No. 43, ¶ 3). Ms. Mann, (a partner at plaintiff's firm who worked on the matter), acknowledges that most of the bills were paid by Hiscox but stresses that she never made any statements that would have led defendant to believe that defendant was not personally liable for the legal fees (NYSCEF Doc. No. 19 at 4). Defendant's interrogatory

answers admit (although with some reservations) that plaintiff was hired to represent her about “issues relating to the Homeland Foundation” and that “defendant received some invoices from plaintiff” (NYSCEF Doc. No. 34).

Defendant’s claim that she was under the impression that Hiscox would pay her legal bills does not create an issue of fact. While the goal may have been to have Hiscox cover as much of her legal fees as possible, that does not mean that she would not be liable if Hiscox refused to make certain payments. If defendant disagreed with Hiscox’s refusal to pay certain fees, then she should have addressed the issue with Hiscox.

The fact that invoices were sent to Hiscox by plaintiff does not evidence an intent that plaintiff only represented defendant for work covered by insurance. A letter from Ms. Mann to defendant on March 13 2014 notes that “As you requested, we have been submitting these invoices to Homeland’s insurance company for payment” (NYSCEF Doc. No. 26). This letter suggests that defendant told plaintiff to take the initiative to send Hiscox the bills directly. The March 2014 letter also states that Hiscox was not paying and that plaintiff needed to be paid (*id.*). Ms Mann observed that plaintiff would direct Hiscox to reimburse defendant (or the Homeland Foundation) depending on who paid plaintiff.

On March 22, 2014, Ms. Mann sent a letter to plaintiff in which Ms. Mann contends that her firm will not be able to represent defendant because “my firm’s invoices have not been paid, and I indicated to you by letter of March 13, 2014 that we would consider withdrawing if we did not receive prompt payment. Despite your utter failure to respond to any of my communications I have not withdrawn as your counsel because I hoped to avoid the prejudicial effect that my withdrawal will have on your case before the Charities Bureau” (NYSCEF Doc. No. 68).

Regarding payment, Ms. Mann told defendant that “you will give me a check for the outstanding balance due to Carter Ledyard at the beginning of the meeting or wire the funds to us prior to the meeting” (*id.*). According to Ms. Mann, Hiscox was slow to pay legal fees so she sought payment from defendant.

There is no question that plaintiff’s representation was *not* limited to whatever Hiscox would pay.

### Pre-AOD Expenses

Plaintiff seeks \$49,936.03 for legal fees rendered prior to the agreement with the AG. Plaintiff claims that it was unable to determine, despite making numerous inquiries with Hiscox, why Hiscox refused to pay these legal fees. Ms. Mann surmises that these fees were not covered based on Hiscox’s letter from October 2014 where Hiscox stressed that there were certain instances in which it would not cover plaintiff’s legal fees. Hiscox noted that “We believe that the unlawful profit or advantage exclusion would apply to those allegations of the NYAG, including but not limited to 1) excessive compensation received by both Lisk and Elizabeth Wyckoff in their roles as President of the Foundation; 2) *ultra vires* donations to certain charities/donations in which certain Trustees allegedly had intimate connections and thus received advantages to which they were not entitled . . .” (NYSCEF Doc. No. 33). In any event, as stated above, it is not plaintiff’s responsibility to recover from Hiscox; it is ultimately defendant’s obligation to ensure that the legal fees were paid.

Defendant claims that she should not have to pay the pre-AOD expenses because plaintiff purported to represent her only in her capacity as an officer and trustee of the Homeland

Foundation and in her capacity as Executrix of her husband’s estate rather than individually. That makes no sense– plaintiff was hired to represent defendant because the AG was looking into illegal behavior at the Homeland Foundation, an organization of which defendant was president. And as plaintiff points out, defendant was fired as President of the Homeland Foundation in April 2014 but plaintiff continued to represent defendant. The record also demonstrates that other entities, including the Homeland Foundation, had their own counsel for the AG’s investigation.

With respect to these pre-AOD unpaid legal fees, defendant’s claim misunderstands the process by which the legal fees were paid. Plaintiff would send the fees, on defendant’s behalf *after* plaintiff had performed the work. Under defendant’s theory, plaintiff would simply have to take a loss on unpaid bills if Hiscox refused to pay. That type of contractual relationship is not evidenced in this record. This Court cannot assume without any support that plaintiff entered into an agreement with defendant whereby plaintiff did legal work for defendant, but was only paid to the extent that a third-party insurer covered the bills.

**Post AOD Expenses**

To the extent that defendant argues that she was forced into incurring additional legal expenses after the AOD, that does not create an issue of fact. It is undisputed that both plaintiff and defendant were aware that Hiscox would not cover legal expenses after the AOD. For good reason, defendant wanted to reduce her legal expenses as indicated in her December 11, 2015 email to plaintiff in which she states that “I am not interested in incurring ANY additional legal expense” (defendant’s cross-motion, exh J). Defendant claims that she was told by an associate



who worked for plaintiff that the post AOD costs would be about \$6,000. Defendant acknowledges in her affidavit that she received a bill from plaintiff on February 2, 2016 (NYSCEF Doc. No. 66 ¶ 33) but does not state that she objected to the invoice.

If defendant did not want to incur more legal fees after the AOD, then she should have demanded a flat fee for post-AOD work, timely objected to the invoices or simply fired plaintiff. But defendant did not do any of that. Instead, plaintiff performed legal work and now defendant wants to avoid paying. Defendant cannot enjoy the benefit of plaintiff's continued representation and then refuse to pay the bills.

#### **Arbitration**

To the extent that defendant argues that she is entitled to fee arbitration, that claim is denied because the total legal fees sought by plaintiff is greater than \$50,000. The fact that the total is made up of pre and post AOD expenses does not create two separate matters. All of plaintiff's legal work arose out of the same representation of defendant in connection with the AG's investigation.

#### **Summary**

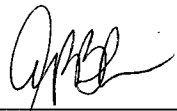
It is undisputed that Hiscox paid the vast majority of the legal fees incurred in plaintiff's representation of defendant. Clearly, both parties benefitted from that arrangement— plaintiff was paid for most of its legal work and defendant did not have to make payment herself. However, that does not mean that plaintiff's representation of defendant was transformed into an arrangement where plaintiff only did work that Hiscox would cover. That may be what

defendant assumed was happening or hoped occurred; but defendant's subjective wish does not change the instant situation. The engagement letter and correspondence from plaintiff demonstrate that defendant was charged for legal services and did not timely object. Defendant cannot point to a single communication where plaintiff waived legal fees not covered by Hiscox or where she timely objected to an invoice.

And defendant's cross-motion and opposition misstate how insurance coverage works in these circumstances. Simply because coverage is available does not mean that every claim is going to be paid. The fact that there was a Officer and Director's Insurance Policy likely made it a more attractive representation for plaintiff, but that has nothing to do with defendant's obligation to pay the bills.

The motion for summary judgment on plaintiff's breach of contract and account stated causes of action is granted. Defendant's affirmative defenses are dismissed and defendant's cross-motion is denied. Plaintiff is directed to e-file a proposed order on or before May 30, 2018 and send a hard copy directly to Room 432 at 60 Centre Street.

**Dated: May 3, 2018**  
**New York, New York**



**ARLENE P. BLUTH, J.S.C.**

**HON. ARLENE P. BLUTH**  
**J.S.C.**