SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice Part 36

KATSKY KORINS LLP,

Plaintiff,

INDEX NO. 657285/2017

-against-

MOTION SEQ. NO. 001

INTERNATIONAL DEVELOPMENT INSTITUTE INC.,

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55
were read on this motion to/for ___ SUMMARY JUDGMENT(AFTER JOINDER___.

Upon the foregoing documents, it is

ORDERED that plaintiff's motion for summary judgment is granted, as provided below.[1]

Plaintiff Katsky Korins LLP moves, pursuant to CPLR 3212, for summary judgment in the sum of $66,897.35, plus interest from December 8, 2017, costs and disbursements, on its second cause of action for an account stated against defendant International Development Institute Inc. In the alternative, plaintiff seeks summary judgment on its first cause of action for breach of contract. Plaintiff also seeks dismissal of defendant's first and second counterclaims.

Pursuant to an engagement letter dated January 31, 2017, defendant retained plaintiff law firm for the limited purpose of analyzing and renegotiating the terms of a lease with its landlord. Pursuant to a second engagement letter dated April 18, 2017, defendant expanded plaintiff's representation by retaining plaintiff to represent it, in an action defendant had commenced in the Supreme Court, Bronx County against its landlord, Westchester Plaza, LLC (*International Development Institute, Inc. v Westchester Plaza, LLC, et al.*, Index No. 309727/2011)(the "Bronx Action"). The April 2017 engagement letter required that defendant pay all outstanding legal fees owed from the first agreement, as well as an additional retainer in the amount of $25,000. Each of the engagement letters concluded with "READ AGREED and ACCEPTED BY: International Development Institute Inc." and were signed by defendant's Executive Director, Leomar Cruz ("Cruz").

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[1] The court notes that it attempted to settle this matter amongst the parties, to no avail.

It is not disputed that on June 6, 2017, defendant met at plaintiff's office to discuss, *inter alia*, the outstanding legal fees owed by defendant. At such meeting, plaintiff's June 6, 2017 invoice totaling $24,850.99, covering the time period from January 18, 2017 through May 30, 2017, was supplied to Cruz (Notice of Motion, Exhibit 8). Defendant does not dispute that it did not protest such invoice, and in fact agreed to pay all outstanding legal fees, as well as the additional $25,000 retainer owed pursuant to the April 2017 engagement letter, by June 30, 2017, which it failed to do.

Thereafter, plaintiff delivered to defendant additional invoices dated July 10, 2017, September 15, 2017, and October 11, 2017. The October 11, 2017 invoice contained a balance of $65,808.42.[2] It is not disputed that but for a payment of $7,500 in February 2017, none of the invoices were paid, nor protested, by defendant. In fact, in an e-mail to plaintiff on October 11, 2017, defendant expressed "deep belie[f] and trust" in plaintiff's "team" and indicated that, as to "the open invoice Leomar is willing to give his land in Florida or California to continue with this project" (Notice of Motion, Exhibit 14).

On or about September 28, 2017, plaintiff moved to withdraw from representing defendant in the Bronx Action, due to, *inter alia*, defendant's failure to pay plaintiff's fees. By order dated October 25, 2017, the Bronx Court granted plaintiff's motion to withdraw, without objection. On or about November 6, 2017, after plaintiff was permitted by the Bronx Court to withdraw as defendant's counsel, defendant sent an email to plaintiff, expressing a desire that plaintiff continue to represent defendant in the Bronx matter, and without any objections or dispute about plaintiff's fees (*see* Notice of Motion, Exhibit 18, November 6, 2017 E-mail). On or about November 13, 2017, plaintiff e-mailed to defendant its final invoice with an outstanding balance of $66,897.53.

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[2] Specifically, such invoices were as follows: (1) Invoice dated July 10, 2017, covering the period between June 2, 2017 and June 26, 2017, reflecting a balance of $33,264.48 (June's Invoice balance, plus an additional $8,413.48) (Notice of Motion, Exhibit 10); (2) Invoice dated September 15, 2017, reflecting a total outstanding balance of $42,280.89 (July's Invoice balance, plus an additional $9,016.42, including a "courtesy discount")(Notice of Motion, Exhibit 12); and (3) Invoice dated October 11, 2017, reflecting a total outstanding balance of $65,808.42 (September's invoice balance, plus an additional $23,526.53, including a "courtesy discount")(Notice of Motion, Exhibit 13).

Plaintiff commenced the within action seeking to recover its fees and expenses totaling $66,897.35, as detailed in the five (5) invoices supplied to defendant. In seeking summary judgment herein, plaintiff maintains that there are no material issues of fact with respect to its account stated cause of action, since defendant acknowledged receipt and retention of the invoices, without objection. Moreover, plaintiff maintains that defendant consented to the fees by not objecting to them during the course of their relationship and representing that it merely needed additional time to pay.

It is well settled that the proponent of a summary judgment motion 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. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment 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*, 49 NY2d at 562. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment. *Id.*

"An account stated has long been defined as an 'account balanced and rendered, with an assent to the balance express or implied[,] so that the demand is essentially the same as if a promissory note had been given for the balance'". *Morrison Cohen Singer & Weinstein, LLP v Ackerman*, 280 AD2d 355, 355-56 (1st Dept 2001) (citations omitted). An account stated is established by a defendant's receipt and retention of a plaintiff's invoice seeking payment for services rendered, without objection within a reasonable time and/or partial payment of an outstanding indebtedness. *See Rockefeller Group, Inc. v Edwards & Hjorth*, 164 AD2d 830, 830 (1st Dept 1990); *Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745, 746 (1st Dept 1983); *Fred Ehrlich, P.C. v Tullo*, 274 AD2d 303, 304-05 (1st Dept 2000); *Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 (1st Dept 2004).

Based on the above principles, summary judgment on plaintiff's second cause of action for an account stated is granted. Plaintiff has made a prima facie showing of entitlement to judgment as a matter of law, on such claim, by demonstrating that: (1) it rendered services to defendant; (2) it sent invoices to defendant for such services; and (3) defendant did not object to the services rendered by plaintiff at any time during plaintiff's representation and even sought to continue the parties' attorney-client relationship, after court approved withdrawal by plaintiff. Further, the documents contained in the

submissions herein, only show gratitude and praise of plaintiff's work and a commitment to pay, rather than any dissatisfaction with plaintiff's services or objections to any fees charged.

Notably, in its opposition, defendant failed to raise any factual issues with respect to the granting of summary judgment on plaintiff's account stated claim. Defendant does not dispute receipt of plaintiff's invoices, nor does defendant allege that it protested or made any objection to the amounts of each invoice, nor the services claimed to have been rendered by plaintiff, orally or in writing, until after plaintiff formally withdrew from the Bronx action, and declined defendant's request to continue representing it. In fact, the affidavit submitted in opposition to plaintiff's motion for summary judgment, by defendant's executive director, Cruz, lacks any mention of any protest or expression of dissatisfaction with plaintiff's services, at any point during the course of plaintiff's representation of defendant. Moreover, defendant does not dispute that, after receipt of the invoices, some of which contained "courtesy" discounts[3], in an email to plaintiff, defendant offered real property, as security to pay the outstanding invoices and expressed its "trust" in plaintiff's "team" and a desire that plaintiff continue with the Bronx lawsuit to its conclusion (*see* Notice of Motion, Exhibit 14, October 11, 2017 E-mail). Defendant also does not dispute that, on or about November 6, 2017, after plaintiff was permitted by the Bronx Court to withdraw, defendant sent another email to plaintiff, expressing a desire that plaintiff continue to represent defendant in the Bronx matter (*see* Notice of Motion, Exhibit 18, November 13, 2017 E-mail). Further, not only did defendant not object to plaintiff's invoices, but, in an email dated August 17, 2017, from defendant's Marketing Director, Maritza A. Polanko, defendant apologized "for the payment delay" and indicated that defendant was "working to resolve this situation" (Plaintiff's Reply, Exhibit 23).

Defendant's argument in opposition to plaintiff's motion that plaintiff's fees are unreasonable is also unavailing. Significantly, it has been held that "'it is not necessary to establish the reasonableness of the fee [claimed] since the client's act of holding the statement without objection will be construed as acquiescence as to its corrrectness'". *Wagner Davis P.C. v Brady*, 51 Misc 3d 132 (A) (App Term, 1st Dept 2016), *lv to appeal dismissed* 29 NY3d 965 [(2017), *rearg denied*, 29 NY3d 1051 (2017); *see also Labidus & Associates, LLP v Elizabeth St., Inc.*, 92 AD3d 405, 406 (1st Dept 2012)("the client's act of

[3] The courtesy discounts supplied to defendant during the course of the parties' relationship total $2,208.03.

holding the statement without objection will be construed as acquiescence as to its correctness"); *Thelen LLP v Omni Contr. Co.*, 79 AD3d 605 (1st Dept 2010)(plaintiff law firm need not establish the reasonableness of its fee where account stated established]; *Cohen Tauber Spievak & Wagner, LLP v Alnwich*, 33 AD3d 562, 562-63 (1st Dept 2006), *lv dismissed* 8 NY3d 840 (2007)("it is not necessary to establish the reasonableness of the fee since the client's act of holding the statement without objection will be construed as acquiescence as to its correctness").

In light of that plaintiff has been granted summary judgment on its account stated cause of action against defendant and awarded its ultimate relief, that portion of plaintiff's motion for summary judgment on its breach of contract cause of action is deemed moot. These remaining causes of action against defendant are alternative theories of recovery and, thus, duplicative of the second cause of action.

Moreover, plaintiff is awarded summary judgment of dismissal of defendant's first and second counterclaims. With respect to defendant's first counterclaim for breach of contract and, specifically, that plaintiff's claimed fees are excessive, as provided above, plaintiff has established its account stated cause of action, since defendants acquiesced to the correctness of the invoices, by not timely objecting to them, during the course of the parties' relationship and, in fact, expressly agreeing to pay the fees, merely asked for additional time. As previously mentioned, defendant even offered to secure its payment of plaintiff's fees, by offering real property. Further, the rules relied upon in support of such counterclaim (22 NYCRR 1200.11 [A]/DR 2-106 [A]), were repealed on or about April 2009, years prior to the signing of the subject retainer agreements.

As to defendant's second counterclaim, for alleged breach of an implied covenant of good faith and fair dealing, notably, defendant does not provide any case for the proposition that plaintiff's withdrawal gives rise to such a claim. Additionally, defendant fails to offer any explanation as to how it can prevail on such a claim, in light of its undisputed praises of plaintiff's work and promises to pay. Moreover, defendant has not shown that it suffered any of its claimed $66,897.35 in damages with respect to either of its counterclaims, as it is not disputed that defendant only paid plaintiff $7,500, towards plaintiff's outstanding fees.

Accordingly, based upon the above, it is

ORDERED that plaintiff's motion for summary judgment is granted to the extent of awarding summary judgment in favor of plaintiff and against defendant International Development Institute, Inc., on the second cause of action in the amount of $66,897.350, together with interest at the statutory rate from December 11, 2017, until entry of judgment, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk, upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly, upon proof of service of a copy of this order upon defendant, with notice of entry; and it is further

ORDERED that portion of plaintiff's motion which seeks dismissal of defendant's first and second counterclaims is granted and such counterclaims are deemed dismissed; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order with notice of entry, upon all defendants.

Dated: July 3, 2019

DORIS LING-COHAN, J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if Appropriate: [ ] DO NOT POST [ ] REFERENCE
[ ] SUBMIT ORDER/JUDG. [ ] SETTLE ORDER/JUDG.

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