

Kasowitz Benson Torres LLP v Allied Partners Inc.

2021 NY Slip Op 31870(U)

June 3, 2021

Supreme Court, New York County

Docket Number: 156790/2020

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. BARBARA JAFFE</u></p> <p style="text-align: right;"><i>Justice</i></p> <p>-----X</p> <p>KASOWITZ BENSON TORRES LLP,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p>	<p>PART</p>	<p>IAS MOTION 12</p> <p>INDEX NO. <u>156790/2020</u></p> <p>MOTION DATE _____</p> <p>MOTION SEQ. NO. <u>001</u></p>
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ALLIED PARTNERS INC., SAVOY HOTEL
PARTNERS LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12-35, 37-70 were read on this motion for summary judgment.

In this action to recover from defendants unpaid legal fees and related costs and disbursements, plaintiff moves pursuant to CPLR 3212 for an order granting it summary judgment. Defendants oppose. Defendant Allied cross moves pursuant to CPLR 3124 and CPLR 3126 for an order compelling plaintiff to produce documents, sit for depositions, respond to interrogatories, and serve a bill of particulars, and conditionally precluding plaintiff from offering evidence until it complies with its discovery obligations.

I. MOTION FOR SUMMARY JUDGMENT

A. Undisputed facts

Nonparty Eric Hadar is the sole shareholder of defendants Allied Partners Inc. and sole member of Savoy Hotel Partners LLC, and he directly or indirectly controls and directs defendants. (NYSCEF 16).

Pursuant to a letter agreement signed on September 12, 2007, Hadar retained plaintiff to

represent him in “certain potential litigation matters.” (NYSCEF 17). Pursuant to a retainer agreement dated as of April 18, 2013, Hadar retained plaintiff to represent Allied in *Merchants Hospitality, Inc. v Allied Partners Inc.*, index 651406/2013. (NYSCEF 15, 17).

From 2007 to 2020, plaintiff represented defendants in 36 separate matters. (NYSCEF 20). There are no written agreements for plaintiff’s representation of defendants in various matters in December 2015, April 2016, December 2016, January 2018, October 2018, and January 2019.

Until January 2020, Michael J. Bowe, then a partner of plaintiff, was responsible for the relationship with Hadar, including reviewing, approving, and sending invoices to him. (NYSCEF 37).

By email dated August 29, 2019, Bowe sent Hadar the “latest invoices for services,” covering November 2018 through July 2019: (1) an August 26, 2019 invoice for the Savoy – Art Basel/Caminos matter (Art Basel) totaling \$476,353.15 (NYSCEF 29); (2) an August 26, 2019 invoice for the Savoy/Ironside Miami (Ironside) matter totaling \$196,899.20 (NYSCEF 30); and (3) an August 26, 2019 invoice for the Savoy/Viceroy matter totaling \$975 (NYSCEF 31).

Less than an hour after receiving this email, Hadar responded, “Please call me! These invoices are way in excess of what we owed, let alone could have collected and they go back nearly a year....” (NYSCEF 21).

By email dated October 31, 2019, plaintiff sent Hadar the October 29, 2019 invoice for an employment matter. Hadar immediately agreed to Bowe’s suggestion that they discuss the invoices and indicated that if the invoices were correct, he would be in trouble, so to speak. (NYSCEF 22).

In November and December 2019, Bowe and Hadar continued to discuss the outstanding

invoices. They also discussed a proposal that one of the Savoy matters be converted from hourly billing into a contingency fee arrangement, although Bowe told Hadar that he could not agree to it without plaintiff's advance approval. (NYSCEF 24).

By email to Bowe dated December 26, 2019, one of Hadar's associates wrote that defendants were "hoping to hear back from [him] this week with a proposal for time and billing on the Savoy," and that she was working with Hadar on the invoices. Bowe immediately explained by return email that he had presented to plaintiff, per his obligation, alternative fee arrangements and had received no answer. (NYSCEF 24).

By email dated December 27, 2019 and copied to plaintiff's principal Marc Kasowitz, Bowe advised plaintiff's executive director that "[w]e will have a million from Hadar by year end. We are not writing off the balance, but that is what is coming in by year end." The director immediately responded, "Hadar is light at \$1.0mm when the 3 entities owe is \$1,893,135 but let's get the \$1.0mm," to which Bowe replied, "1.8? The spreadsheet said 1.444." The director then emailed Bowe that he had rendered "some new invoices since that old chart. Here are the totals: Allied \$213,534 Hadar \$1,444,412 Savoy \$235,189." Bowe acknowledged the numbers and advised that he had not discussed the new invoices with Hadar. (NYSCEF 25).

Hadar paid the \$1 million on behalf of Savoy.

In or around January 2020, Bowe and another of plaintiff's partners left plaintiff and became partners at a different law firm, taking Hadar and defendants along with them as clients. Plaintiff continued to serve as counsel for Savoy in connection with the Art Basel matter.

On May 11, 2020, plaintiff sent Hadar an invoice in connection with that matter for \$53,677.67 for services rendered from February 2020 through April 2020 (NYSCEF 26). On June 15, 2020, plaintiff sent Hadar another invoice in connection with the Art Basel matter

totaling \$403,644.50 for services rendered between November 2019 and February 2020 (NYSCEF 27).

Hadar subsequently directed the transfer of representation in the Art Basel matter to Bowe at his new law firm and refused to pay any of the outstanding invoices.

By letter dated and emailed to Hadar on June 17, 2020, the managing partner wrote to Hadar, stating that while Hadar had claimed to have reached an agreement with Bowe at the end of 2019 to convert the relationship to a contingency fee arrangement, there was no record of it having been authorized or memorialized. The managing partner thus asserted entitlement to being paid in *quantum meruit* as Hadar had retained Bowe at the new firm. He offered Hadar a \$191,288 discount for time charges incurred before October 2019 for the Art Basel matter, which had been incorrectly invoiced to another matter for Savoy. The discount would have reduced the alleged balance owed for the Art Basel matter to \$933,675.32. (*Id.*).

In text correspondence dated June 2, 2020, Hadar informed another of plaintiff's partners that after he paid the \$1 million, plaintiff sent him new invoices whereby the wrong client was billed, which was upsetting to him and "ethically improper." He also relayed his discussions with Bowe regarding the amounts due. (NYSCEF 55).

B. Breach of contract

Absent any dispute that there is no written retainer agreement or other writing between the parties governing the matters covered by the invoices at issue here, plaintiff does not establish that defendants breached a contract with it. (*Frechtman v Gutterman*, 140 AD3d 538 [1st Dept 2016] [absent retainer agreement, breach of contract claim failed as matter of law]).

C. Account stated

An account stated is created when there is an agreement between parties to an account

based on prior transactions between them related to the accuracy of the account and the balance due, and it may be implied by one party's retention of invoices for an unreasonable period of time without objection and from the surrounding circumstances. (*Hubbell, Inc. v Lazy Swan Golf & Country Club LLC*, 187 AD3d 1448 [3d Dept 2020]). However, the account is not implied when the amount owed is in dispute and the dispute should have been evident to the plaintiff. (*Id.* at 1448). Whether an invoice has been held without objection for a sufficient period of time to give rise to an inference of assent to it is ordinarily a question of fact and raises a question of law only in those cases where one inference is rational. (*Accent Collections, Inc. v Cappelli Enter., Inc.*, 94 AD3d 1026 [2d Dept 2012]).

Here, the evidence demonstrates that when Bowe sent Hadar the August 2019 email with attached invoices, Hadar responded almost immediately, or within the same hour, by objecting to the amount of the invoices and the fact that Bowe had apparently not sent him monthly invoices but let the amounts accumulate for nearly a year, and he asked that Bowe contact him to discuss the invoices.

Similarly, on receipt of an October 2019 email from Bowe in which Bowe himself suggested that they discuss the amount of the invoices, Hadar responded within 30 minutes to agree to meet, again indicating that the amounts billed were too high.

In November and December 2019, Bowe and Hadar discussed the outstanding invoices, and Hadar requested that plaintiff convert one of the matters from hourly billing to a contingency fee agreement. Negotiations continued and it was agreed that Hadar would pay \$1 million toward the balance, with the remainder of the balance unresolved.

Based on these undisputed events, plaintiff fails to establish, *prima facie*, that Hadar retained the invoices without objection for an unreasonable period of time. (*See eg, RPI Prof.*

Alternatives, Inc. v Citigroup Global Markets Inc., 61 AD3d 618 [1st Dept 2009] [evidence offered that within reasonable time, defendant informed plaintiff by email that it would not make further payments on outstanding invoices based on review of plaintiff's progress and amounts billed, and plaintiff acknowledged receipt thereof; acknowledgement negated inference that defendant consented to correctness of outstanding invoices]).

While plaintiff alleges that Hadar's emailed objections were insufficiently specific, Hadar and Bowe, through their respective affidavit and affirmation, demonstrate that during numerous conversations and meetings between them, Hadar voiced specific objections to the invoices, resulting in the parties' attempt to negotiate the amount due. (*See Boies, Schiller & Flexner LLP v Modell*, 129 AD3d 533 [1st Dept 2015] [defendant raised triable issue as to alleged consent based on evidence that she called plaintiff within day or two of receiving invoices, spoke to lawyer handling case, and objected to them on ground that she did not understand charges, they appeared unwarranted, and she could not pay, thereby providing sufficiently detailed objections]; *see also Herrick, Feinstien v Stamm*, 297 AD2d 477 [1st Dept 2002] [defendant's alleged statement during phone conversation with plaintiff, two months after receipt of first invoice, that he was "very troubled by the size of the bills," sufficiently specific and timely to negate inference of assent]).

Moreover, given Hadar's prior and ongoing objections, his payment of \$1 million does not establish that he agreed to the remaining amounts due or for amounts invoiced later. (*Id.* at 533 [defendant's payment of one invoice did not eliminate triable issue as to its consent to later invoices as it objected to and refused to pay later invoices]).

To the extent that Hadar did not respond to invoices sent in 2020, after Bowe had left the firm and taken Hadar with him as a client, plaintiff knew by that point that Hadar had objected to

both the invoices he had previously received and the billing structure at issue. (*See Hubbell*, 187 AD3d at 1448 [while defendants did not respond to plaintiff after receipt of invoices, defendants submitted proof that amount was previously in dispute and plaintiff was aware of it, as defendants had previously met with plaintiff's president and attempted to negotiate amount, thereby disputing amount owed; thus, when plaintiff sent invoices, defendant had already expressed disagreement with amount sought and, therefore, "defendants' silence at that time cannot be considered acquiescence to the correctness of the billing statements."]).

Even assuming that the affidavit of plaintiff's executor director sufficiently sets forth a *prima facie* case, Hadar's affidavit and Bowe's affirmation raise triable issues as to the amounts owed by defendants and whether plaintiff correctly billed them. Indeed, in Bowe's affirmation, he recites in detail his numerous conversations with Hadar and plaintiff's principal and executive director about the invoices and the amount owed by defendants, and Hadar's objections thereto, and his own belief that the billing was occasionally incorrect. Bowe's affirmation based on his own personal knowledge is un rebutted by an affirmation or affidavit from plaintiff's principal. (*See e.g., Frechtman*, 140 AD3d at 538 [summary judgment properly denied as conflicting affidavits, billing statements, and email correspondence between parties raised triable issue as to whether defendants objected to statement it received from plaintiff]; *see also Accent Collections, Inc.*, 94 AD3d at 1027 [defendant raised triable issue through affidavit from which it could be inferred that defendant personally objected to invoices]).

D. Unjust enrichment

For the same reasons as above, plaintiff does not establish its *prima facie* entitlement on its unjust enrichment claim.

II. MOTION TO COMPEL

The cross motion to compel is granted to the extent of directing the parties to enter into a preliminary conference order by emailing an executed preliminary conference stipulation to cpaszko@nycourts.gov within 30 days of the date of this order.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment is denied in its entirety; and it is further

ORDERED, that the cross motion to compel is granted to the extent indicated above.

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6/3/2021
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: