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AMENDED SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

FORCHELLI, CURTO, DEEGAN, SCHWARTZ, MINEO, COHN & TERRANA, LLP f/k/a FORCHELLI, CURTO, CROWE, DEEGAN, SCHWARTZ, MINEO & COHN, LLP	TRIAL/IAS, PART 41 NASSAU COUNTY INDEX NO.: 8151-11
Plaintiffs,	MOTION SUBMISSION DATE: 3-29-12
-against-	MOTION SEQUENCE NO. 1
NACHAMA HIRSCH,	
Defendant.	

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Affidavit in Opposition of Defendant	X
Reply Affirmation	X

Motion pursuant to CPLR 3212 by the plaintiff Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP, *et, al.,* for summary judgment on its complaint and dismissal of the defendant Nachama Hirsch's counterclaims; and/or alternatively, for a default judgment pursuant to CPLR 3215[e].

The plaintiff-law firm, Forchelli, Curto, *et., al.* ["Forchelli"], represented the *pro se* defendant, Nachama Hirsch, for several years in a contentiously litigated bankruptcy proceeding, and claims to have generated and properly billed

her for some $400,000.00 in legal fees – fees which to date, she had not yet paid (*see, Musso v. Hirsch*, ___F.Supp.2d.___, 2011 WL 4543225 [E.D.N.Y.2011]; *Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP v. Hirsch*, ___F.Supp2d.___, 2010 WL 2667198 [E.D.N.Y. 2010]; *see generally, Caruso, Caruso & Brands, P.C. v Hirsch*, ___Misc.3d.___, 2010 WL 1740755, at 2 [Supreme Court, Kings County 2010]).

In 2008, and then in 2010, Forchelli commenced two successive, non-payment actions against the defendant in this Court, both of which were dismissed for the same reasons; namely, that when the actions were commenced, Forchelli had not yet been formally relieved as the defendant's counsel in the Bankruptcy Court, thereby violating the ethical precept barring a law firm from suing its own client (Hirsch Aff., Exhs., "A", "B" *see, Forchelli v. Hirsch*, ___Misc.3d.___, Index Nos. 17574-10 [Marber, J.]; 16272-08 [Phelan, J.]; *see also, Credit Index, L.L.C. v. RiskWise Intl., L.L.C.*, 192 Misc.2d 755, 763 [Supreme Court, New York County 2002], *aff'd,* 296 AD2d 318; 22 NYCRR § 1200.1 Rule 1.7 *see,* Disciplinary Rule, *former*, 5-105).

Thereafter, in May of 2011, Forchelli commenced this non-payment action – its third to date – in which it has interposed fee claims grounded upon breach of contract and "account stated" theories of recovery.

The defendant has answered, denied the material allegations of the complaint and interposed several affirmative defenses and a series of nine counterclaims.

Forchelli now moves for: (1) summary judgment on its account stated claim; (2) dismissal of the defendant's counterclaims; and (3) alternatively, for a default judgment based on the claim that, *inter alia*, the defendant's answer was served one day after a previously granted extension had expired. Forchelli's motion to dismiss should be granted only to the extent indicated below.

Preliminarily, since the defendant's opposing submissions contain an affidavit attesting to the timely service of the answer – to which no objection has been registered in Forchelli's reply papers – that branch of the motion which is for a default judgment should be denied. In any event, and assuming the answer was served a day late, the delay was minor, no prejudice has been alleged or demonstrated and public policy favors the resolution on claims on the merits (*see generally, Vinny Petulla Contracting Corp. v. Ranieri,* ___AD3d___, 941 N.Y.S.2d 659; *Zanelli v. Jmm Raceway, LLC*, 83 AD3d 697). Further, while the defendant's *pro se* answer was apparently labeled with the wrong index (one associated with one of Forchelli's prior, dismissed actions), this technical

omission – also raised by Forchelli – is properly disregarded as harmless and non-prejudicial.

Turning to Forchelli's motion on its account stated theory, while an account stated will arise where, *inter alia*, bills sent to a debtor are retained without timely objection (*e.g.*, *Interman Indus. Prods. v. R.S.M. Electron Power*, 37 NY2d 151, 153-154 [1975]; *White Plains Cleaning Services, Inc. v. 901 Properties, LLC*, ___AD3d___, 2012 WL 1415113 [2nd Dept. 2012]; *Law Offices of Kleinbaum v. Shurkin*, 88 AD3d 659), a summary judgment movant must first make a foundational showing that the invoices it relies on were sent to a client using a regular office mailing practice or procedure (*Morrison Cohen Singer & Weinstein, LLP v Brophy*, 19 AD3d 161, 162; *Melito & Adolfsen, P.C. v. Travelers Indem. Co.*,___Misc.3d.___, 2008 WL 4308287, at 3 [Supreme Court, New York County 2008]; *Elm Suspension Systems, Inc. v. Skyline Restoration & Waterproofing, Inc.*,___Misc.3d.___, 2008 WL 2158108 [Supreme Court, New York County 2008]; *cf., Nassau Ins. Co. v. Murray*, 46 NY2d 828, 829, 830 [1978]). That showing has not been made here.

The relevant documentary materials submitted in support of Forchelli's include, *inter alia*: (1) the affidavit of a Forchelli associate who does not profess to have personal knowledge of client billing and/or mailing procedures (*Elm*

Suspension Systems, Inc. v. Skyline Restoration & Waterproofing, Inc., *supra*); and (2) a five-paragraph affidavit offered by the firm's office administrator. The office administrator asserts, in circular fashion, that she knows the submitted bills were in fact mailed, because when bills are mailed, it is the practice of the billing department to place staples at the top and center off each bill and then place them in the file – where she claims she located the center-stapled bills at issue here (Kawochka Aff., ¶¶ 4-5).

Although the office administrator states that she oversees the firm's billing department, she does not describe the process by which bills are mailed (*Morgan, Lewis & Bockius LLP v. IBuyDigital.com, Inc.*___Misc.3d.___, 2007 WL 258305, at 2-3[Supreme Court New York County 2007]; *cf., Badio v. Liberty Mut. Fire Ins. Co.*, 12 AD3d 229, 230), and does not assert that she has personal knowledge of whatever office practices and procedures are utilized to actually mail bills (*see generally, Mid City Const. Co., Inc. v. Sirius America Ins. Co.,* 70 AD3d 789, 790; *New York & Presbyt. Hosp. v Allstate Ins. Co.*, 29 AD3d 547, 548; *Scottsdale Ins. Co. v. Insulation Inc.*,___Misc.3d.___, 2011 WL 5118144 [Supreme Court, New York County 2011]; *Elm Suspension Systems, Inc. v. Skyline Restoration & Waterproofing, Inc., supra*).

Further, her claims that center-stapled invoices were located in a billing file, is not evidence of an office mailing practice and procedure; rather, it is an attempt to reason backwards based on the presence of documents placed in a file *after* the mailing has already occurred. More specifically, although the claims made with respect to the stapling of invoices may describe how those documents are appear or are maintained in a file, they are not evidence of whatever office practices are used to mail them to clients. Notably, the bills themselves do not establish that they were mailed or transmitted to the defendant (*Scottsdale Ins. Co. v. Insulation Inc.*, *supra*).

Significantly, "[w]here * * * [a movant] fails to prove that such invoices were properly addressed and mailed, and there is no evidence of a regular office mailing procedure, there should be no presumption of receipt" (*Melito & Adolfsen, P.C. v. Travelers Indem. Co.*, *supra*, 2008 WL 4308287, at 3; *see e.g.*, *Morrison Cohen Singer & Weinstein, LLP v Brophy*, *supra; Afroze Textile Industries (Private) Ltd. v. Ultimate Apparel, Inc.*, ___ F.Supp.2d.___, 2009 WL 2167839, at 6 [E.D.N.Y. 2009]). Contrary to Forchelli's contentions, the record does not establish as a matter of law that the defendant otherwise admitted to receiving the bills (Hirsch Aff., ¶ 36 *see, Afroze Textile Industries (Private) Ltd. v. Ultimate Apparel, Inc.*, *supra*, 2009 WL 2167839, at 6) or that, to the extent partial

payments were made, these payments can be construed as an account stated with respect to the entire, multi-year series of billing statements relied upon (*accord, Melito & Adolfsen, P.C. v. Travelers Indem. Co., supra*, 2008 WL 4308287, at 3; *cf., Landa v. Blocker*, 87 AD3d 719, 721)(Kawochka Aff., ¶ 5). It is settled that "[w]hether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a question of law only in those cases where only one inference is rationally possible" (*Yannelli, Zevin & Civardi v Sakol*, 298 AD2d 579, 580, *quoting from, Legum v. Ruthen*, 211 AD2d 701, 703 [2002]; *see, Landau v. Weissman,* 78 AD3d 661, 662; *Shelly v. Skief*, 73 AD3d 1016; *Arrow Empl. Agency v. David Rosen Bakery Supplies,* 2 AD3d 762, 762–763; *Landa v. Blocker, supra*).

Those branches of Forchelli's motion which are to dismiss the negligence and attorney malpractice and related claims, as interposed in the first and second counterclaims, should also denied.

"To succeed on a motion for summary judgment dismissing the complaint in a legal malpractice action, the defendant must present evidence in admissible form establishing that the plaintiff is unable to prove at least one essential element of his or her cause of action alleging legal malpractice" (*Gelobter v. Fox*, 90 AD3d

829, 831; *Scartozzi v. Potruch*, 72 AD3d 787, 789–790). With respect to the first counterclaim, based on alleged misconduct committed prior to 2007 in the underlying Chapter 11 bankruptcy proceeding, issues of fact exist as to whether Forchelli's admittedly continuing, post-2007 bankruptcy representation, operated as toll of the limitations period within the meaning of the continuous representation doctrine (*e.g., DeStaso v. Condon Resnick, LLP,* 90 AD3d 809, 812; *Putnam County Temple & Jewish Center, Inc. v. Rhinebeck Sav. Bank*, 87 AD3d 1118; *Howish v. Perrotta*, 84 AD3d 1312; *Leon Petroleum, LLC v. Carl S. Levine & Associates, P.C.*, 80 AD3d 573, 574 *see generally*, *Zorn v. Gilbert,* 8 NY3d 933, 934 [2007]; *McCoy v. Feinman*, 99 NY2d 295, 306 [2002];*Shumsky v. Eisenstein*, 96 NY2d 164, 167–168 [2001]; CPLR 214[6]). Notably, "[t]o dismiss a cause of action pursuant to CPLR 3211[a][5] on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired" (*DeStaso v Condon Resnick, LLP*, *supra,* 90 AD3d 809, 812).

Contrary to Forchelli's assertions (Gatto Aff., ¶¶ 45-46), the conclusorily supported claim that its subsequent representation was entirely distinct because the bankruptcy proceeding was converted from a Chapter 11 to a Chapter 7 proceeding (Gatto Aff., ¶ 43; Gatto Reply Aff., ¶¶ 33-37), does not establish its

entitlement to judgment as a matter of law. Similarly, the defendant's over billing and related claims (as interposed in the second counterclaim) are not amenable to summary resolution at this essentially pre-discovery juncture of the action (*see generally, Gelobter v. Fox,* 90 AD3d 829, 831; *Melito & Adolfsen, P.C. v. Travelers Indem. Co., supra*, 2008 WL 4308287, at 3; *see also, Bank of America, N.A. v. Hillside Cycles, Inc.,* 89 AD3d 653, 654; *Valdivia v. Consolidated Resistance Co. of America, Inc.*, 54 AD3d 753, 755). The Court notes that in advancing several of its factual claims, Forchelli relies on inconclusive snippets of testimony culled from the defendant's *pro se* deposition, which was taken in one of the prior dismissed Forchelli non-payment actions (*e.g.*, Gatto Aff., ¶¶ 31, 39, 42, 53; Reply Aff., ¶ 30)(*cf.*, *Baillargeon v Kings County Waterproofing Corp.*, 29 AD3d 838, 839).

Summary judgment is a drastic remedy which may be granted only where there is no clear triable issue of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Mosheyev v. Pilevsky*, 283 AD2d 469). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (*In re Cuttitto Family Trust*, 10 AD3d 656; *Rudnitsky v. Robbins*, 191 AD2d 488, 489). Moreover, "[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or

defense'" (*Fromme v. Lamour*, 292 AD2d 417; *see, Tsekhanovskaya v. Starrett City, Inc.*, 90 AD3d 909, 910).

However, Forchelli has established its *prima facie* entitlement to judgment dismissing the remaining counterclaims interposed by the defendant, *i.e.*, the third through ninth counterclaims.

The third through fifth counterclaims allege that Forchelli committed the tort of malicious prosecution by commencing the two prior actions in violation of ethical rules governing attorney conduct. To the extent that the foregoing claims are predicated on alleged violations of the professional rules of conduct, they fail to state a cause of action, inasmuch as no private right of action lies for such an alleged violation (*see, Shapiro v McNeill*, 92 NY2d 91, 97 [1998]; *DeStaso v. Condon Resnick, LLP*, *supra*, 90 AD3d 809, 814; *Kantor v Bernstein*, 225 AD2d 500, 502). In any event, while Forchelli's two prior actions were dismissed, both orders provided that the dismissals were "without prejudice", *i.e.*, neither Court reached the merits of the claims made, but instead, predicated the dismissals on matters unrelated to the substance of fee claims advanced (Hirsch Aff., Exhs., "A", "B").

It is settled that to succeed on a claim alleging the malicious commencement of civil proceedings, the prior action a must terminate favorably to the party

asserting the claim, meaning that, evidence must be adduced establishing "'the court passed on the merits of the charge or claim * * * under such circumstances as to show * * * nonliability,' or evidence that the action was abandoned under circumstances 'which fairly imply the plaintiff's innocence'" (*Castro v. East End Plastic, Reconstructive & Hand Surgery, P.C.*, 47 AD3d 608, 609, *quoting from, Pagliarulo v. Pagliarulo*, 30 AD2d 840; *accord, Hudson Valley Marine, Inc. v. Town of Cortlandt*, 79 AD3d 700, 703; *Furgang & Adwar, LLP v. Fiber-Shield Industries, Inc.*, 55 AD3d 665, 566).

Lastly, those branches of the motion which are to dismiss the sixth through ninth counterclaims – asserting claims for sanctions and costs based on 22 NYCRR § 130-1.1; CPLR 8303-a – should also be dismissed since there is no independent cause of action for the recovery of sanctions (*Cerciello v. Admiral Ins. Brokerage Corp.*, 90 AD3d 967, 968; *360 West 11th LLC v. ACG Credit Co. II, LLC,* 90 AD3d 552, 554; *Schwartz v Sayah*, 72 AD3d 790, 792)(Ans.,¶¶ 45-54).

The Court has considered Forchelli's remaining contentions and concludes that they do not support an award of relief except to the extent granted above.

Accordingly, it is,

ORDERED the motion by the plaintiff Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP, *et, al.,* for, *inter alia*, summary judgment on its complaint and for dismissal of the defendant Nachama Hirsch's counterclaims, is granted to the limited extent that the third through ninth counterclaims are dismissed, and the motion is otherwise denied.

The foregoing constitutes the decision and order of the Court.

Dated: May 8, 2012

STEVEN M. JAEGER, A.J.S.C.