SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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MEYER, SUOZZI, ENGLISH & KLEIN, P.C.,
Plaintiff,

-against-

JEROBOAM CO., INC., D.M.K.P., INC.,
GERALD COTTER and JANE COTTER
Defendants.

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MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 18
Index No.: 18574/05
Motion Seq. Nos.:01 & 02

DECISION AND ORDER

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Plaintiff law firm, Meyer, Suozzi, English & Klein, P.C. (the "Firm") moves for an order pursuant to CPLR §3212 for partial summary judgment against defendants Jeroboam Co., Inc. ("Jeroboam"), Gerald Cotter and D.M.K.P., Inc. ("DMKP") on the first, second and third causes of action of the Plaintiff's complaint as well as summary judgment on the Defendants' second through ninth affirmative defenses and defendants' sole counterclaim for disgorgement.

Defendants Gerald and Jane Cotter, DMKP and Jeroboam move for partial summary judgment as to Plaintiff's first, second, third and fifth causes of action as well as Defendants' third affirmative defense and Defendants' sole counterclaim for disgorgement.

Plaintiff commenced this action to collect fees and disbursements from Defendants.

In April, 2003, Cotter, Jeroboam and DMKP engaged plaintiff to represent them in a Supreme Court, Nassau County matter ("the underlying action"). Plaintiff alleges it sent a retention letter to Defendants explaining its fees and requesting a $5,000 retainer. Plaintiff requested that Defendants sign the "client approval" segment and return the document to Plaintiff (see Exhibit A annexed to Plaintiff's motion). Plaintiff believed the "retention letter" was signed

and returned to plaintiff's office, but Plaintiff cannot locate it.

Plaintiff alleges it charged Defendants a total of $482,020 in fees of which Defendants remitted in excess of $300,000 to Plaintiff. Thus, Plaintiff alleges Defendants owe the Firm over $169,000 in fees.

Gerald Cotter is president of Jeroboam Co., Inc. and DMKP. Co-Defendant Jane Cotter is Defendant Gerald Cotter's wife. She is not the focus of Plaintiff's motion. Defendants deny they ever received the retention letter from the firm but contend that they had an agreement with Plaintiff to cap the Plaintiff's fees at $300,000. Thus, they allege they have paid for Plaintiff's services up to the agreed upon cap.

The Court is at a major disadvantage in reviewing Plaintiff's specific claims in that the Plaintiff's Complaint has been sealed (see Exhibits C, D annexed to Plaintiff's motion).

Pursuant to 22 NYCRR § 1215, as of March 4, 2002, a written letter of engagement is required (with some exceptions that do not apply here) and the letter shall address the fees to be charged and scope of the legal services to be provided to the client.

Was a letter of retention/engagement ever sent to Defendants? Here, there is an affidavit of Denise Blake (see annexed to Barry Shapiro's affidavit in further support), the secretary to Barry Shapiro, that the practice of Mr. Shapiro, the attorney in Plaintiff's firm that represented Defendants, was that he sent out retention letters when clients, such as Defendants, were initially interviewed. Gerald Cotter, in his affidavit (see Exhibit A annexed to Defendants' cross motion) denies ever having received the retention letter, thus he never signed and returned the document.

An affidavit denying execution of a document and denying that proceeds are due under the alleged retainer was required to be accepted as true for purposes of a motion for summary

judgment *Patrolmen's Benevolent Ass'n of New York, Inc. v City of New York*, 27 NY2d 410 (1971).

Defendants contend a $300,000 cap was imposed on Plaintiff's fee. They contest generally all the alleged fees that exceed that amount. Assuming the retention agreement offered by Plaintiff is a valid one, there is nothing as to provisions for "capping" of Plaintiff's total fee or what apparatus would be needed for Plaintiff's attorney to obtain (or the degree of difficulty of getting) a cap (Mr. Shapiro claims a three-person committee from the Plaintiff firm would be required). Defendants contend a cap agreement of $300,000 was reached.

Credibility of witnesses, truthfulness and accuracy of testimony, whether contradicted or not, and the significance of weaknesses and discrepancies are all issues for the trier of fact. *Pedone v B&B Equipment Co., Inc.*, 239 AD2d 397(2d Dept 1997) Clearly, there is an issue of fact as to whether or not the letter of engagement or letter of retention was ever sent and/or received by Defendants.

As for past offenses against Gerald Cotter noted by Plaintiff, a jury could evaluate Gerald Cotter's testimony and weigh it in light of his past history. A fact finder would not, automatically, consider Gerald Cotter's statement herein as untruths.

One of Plaintiff's causes of action is for an account stated. An account stated is 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 while the mere silence and failure to object to an account stated cannot be construed as an agreement to the correctness of the account, the factual situation attending the particular transactions may be such that, in the absence of an objection made within a reasonable time, an implied account stated may be found

(*Yannelli, Zevin & Civardi v Sakol*, 298 AD2d 579[2d Dept 2002]).

A party relying upon an account stated must prove that the account was presented, that by mutual agreement it was accepted as correct, and that the debtor promised to pay the account stated (*Milstein v Montefiore Club of Buffalo, Inc.*, 47 AD2d 805 [4th Dept, 1975]).

The Plaintiff creditor generally need not prove the details of the original debt, but he or she may merely show the Defendant received the account and kept it for a reasonable time without objection; the burden is then on the party receiving the account to show fraud, mistake, or that it was never accepted as an account stated (*Bank of New York-Delaware v Santarelli*, 128 Misc.2d 1003[NY County Court 1985]).

Here, the Defendants did raise an issue of fact in that they objected to the amount billed to them (see Exhibit A annexed to Defendants' cross motion).

The sworn affidavit of Gerald Cotter (see Exhibit A annexed to Defendants' cross motion) clearly indicates he sought a retainer agreement with a $300,000 cap but he never received any correspondence from Plaintiff.

Thus, the Defendants set forth specific allegations of protest in support of its position. Here, Defendants' conduct was sufficient to rebut an inference of an implied agreement to pay the amount stated (*1000 Northern of New York Co. v Great Neck Medical Associates*, 7 AD3d 592[2d Dept 2004]).

Whether 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 (*Arrow Employment Agency, Inc. v David Rosen Bakery Supplies*, 2 AD3d 762[2d Dept 2003]);

Yannelli, Zevin & Civardi v Sakol, supra). Here, there are, from the record herein, many inferences possible.

Where work, labor and services are fully itemized with the reasonable value/price for those items are set forth in a verified complaint, the Defendant, in its verified answer, must indicate specifically those items in dispute (*Netguistics, Inc. v Caldwell Banker Prime Properties, Inc.*, 23 AD3d 719 [3d Dept 2005]). With a general denial failing to raise a question or questions of fact, a Plaintiff is entitled to summary judgment on the pleadings (*Offset Paperback Mfrs., Inc. v Banner Press, Inc.*, 47 AD2d 733, *aff'd* 39 NY2d 770 [1st Dept 1975]). Here, Plaintiff has allegedly fully itemized its various charges (the complaint and itemization are sealed). Defendants, in their answer, issue a general denial. But Defendants do not seek or say they wish to object to "specific" charges. They contend Plaintiff violated its cap agreement of $300,000 by billing Defendants in excess of $480,000.

The invoices at issue must be sufficiently descriptive to allow Defendant to respond in a meaningful way on an item by item basis (*Netguistics, Inc. v Caldwell Banker Prime Properties, Inc., supra*).

A Defendant's failure to specifically dispute the individual items alleged to comprise the Plaintiff's accounts stated where the Defendant disputes the entirety of the alleged dealings rather than the individual contents of the accounts stated is of little moment (*Harbor Seafood, Inc. v quality Fish Co., Inc.*, 194 AD2d 713 [2nd Dept 2003]).

Defendants herein, for the purpose of opposing a summary judgment motion, are not required to object to every specific item or items in their bill of services. Besides, the Plaintiff's specific items are sealed along with the complaint.

The Court will now examine the Defendants' affirmative defenses. Defendants' second affirmative defense contends Plaintiff never entered into an agreement with the Defendants. Defendants' third affirmative defense contends Plaintiff did not comply with 22 NYCRR Part 1215 in that Plaintiff did not have a retention agreement with Defendants. The court has discussed this, *supra*. Defendants' fourth affirmative defense contend that Plaintiff's complaint is based on fraudulent and erroneous charges. The fifth affirmative defense is that Plaintiff has been fully compensated. The sixth and seventh affirmative defenses contends the Plaintiff made fraudulent and negligent misrepresentations to the Defendants. The eighth affirmative defense contends Defendants' objections to Plaintiff's claimed monies owed is barred. The ninth affirmative defense is that Plaintiff's invoices are illegal.

Where a Defendant's allegations of fraud and negligence arise solely from contractual duties, they must be dismissed (*see Paragon Restoration Group, Inc. v Cambridge Square Condominiums*, 42 AD3d 905 [4th Dept 2007]). Thus, Defendants' sixth affirmative defense for fraud and the seventh affirmative defense of negligence must be dismissed since the issues here are the contractual duties owed by Plaintiff to Defendants. To that same degree that branch of Defendants' fourth affirmative defense based on "fraudulent" charges must be stricken. The ninth affirmative defense of "illegal invoices" can be interpreted as invoices issued with the improper retainer agreement. The remaining affirmative defenses objected to by Plaintiff (second, third, fifth, eighth and ninth) are viable since there are issues of fact as to them.

As to Defendants' sole counterclaim, Defendants seek disgorgement of the monies already paid by Defendants ($300,000) for Plaintiff's alleged failure to comply with 22 NYCRR § 1215 by not providing Defendants with a written letter of engagement. As note earlier, there is an issue

of fact as to whether or not the letter of retention was sent.

Disgorgement is not required for failure to comply with written retainer rules (*Mulcahy v Mulcahy*, 285 AD2d 587 2d Dept 2001, *lv to app den.* 97 NY2d 605[2001]).

A law firm's failure to obtain a written retainer agreement or letter of engagement with a non-matrimonial client does not preclude the firm from seeking to recover in *quantum meruit* for the fair and reasonable value of the services rendered on behalf of the client prior to discharge (*Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54[2d Dept 2007]).

Clearly, at the least, there is, based on the Appellate Division ruling, no issue of fact to Defendants' disgorgement counterclaim. It must be dismissed.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320[1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News,* 211 AD2d 626 [2d Dept 1995]). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio,* 81 NY2d 1062[1993]).

Accordingly, the Plaintiff's motion is **Granted** to the extent that Defendants' fourth, sixth and seventh affirmative defenses are dismissed, as is Defendants' counterclaim for disgorgement.

As to Defendants' cross motion, except for the dismissed counterclaim of disgorgement, there are issues of fact as to all relief requested. Therefore, their cross motion must be **Denied**.

The parties are directed to appear for a Preliminary Conference in DCM on December 4, 2007.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: October 30, 2007
Mineola, N.Y.

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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