

Emery Celli Brinkerhoff & Abady, LLP v Rose

2010 NY Slip Op 33300(U)

November 23, 2010

Supreme Court, New York County

Docket Number: 103871/10

Judge: Joan A. Madden

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

PRESENT: Hon. Joan A. W. Miller
Justice

PART 11

Index Number : 103871/2010
EMERY CELLI BRINCKERHOFF &
VS.
ROSE, MICHAEL
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT/LIEU COMPLAINT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the court's Memorandum Decision & order.

FILED
DEC 01 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: November 23, 2010

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X
EMERY CELLI BRINKERHOFF &
ABADY, LLP,

Index No. 103871/10

Plaintiff,

-against-

MICHAEL ROSE,

Defendant

-----X
JOAN MADDEN, J.:

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Plaintiff Emery Celli Brinkerhoff & Abady, LLP ("ECBA") moves for summary judgment in lieu of a complaint pursuant to CPLR 3213 with respect legal fees allegedly due and owing from its former client, defendant Michael Rose ("Rose"). Rose opposes the motion, which is denied for the reasons below.

In February 2005, Rose retained ECBA, a Manhattan law firm specializing in litigation, to represent him and his company, Broadside Realty Corporation in connection with various disputes concerning his company, its shareholders, its assets and related matters. Rose signed a retainer agreement setting forth ECBA's hourly rates and billing procedures, including that Rose would be sent a monthly invoice to be paid 30 days from the date of the bill, and that interest would be charged on any unpaid balance not paid in full within 60 days.¹

According to ECBA, Rose stopped paying his bills regularly in 2006, and by December 9, 2009, he owed a balance of \$439,439.03, consisting of 438,796.41 in legal fees and \$642.62 in disbursements. ECBA now moves for summary judgment in lieu of complaint seeking \$438,796 in legal fees based on a theory of an account stated. In support of the motion, ECBA submits an

¹In connection with the retainer agreement, Rose agreed to provide ECBA with a refundable initial retainer of \$50,000

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affirmation from Richard D. Emery, Esq., a partner at ECBA, ECBA's retainer agreement with Rose, copies of the invoices sent to Rose from January 2006 to December 2009, and copies of monthly reminders sent to Rose regarding his outstanding balance and interest accruing on that balance.

In opposition, Rose submits an affirmation from counsel, asserting that summary judgment is not warranted as Rose made timely objections to the legal bills at issue, and that he needs to obtain information from non-parties regarding the billings on certain tax matters, and that the subpoenas for such information have not yet been responded to.²

In reply, ECBA argues that the affirmation of Rose's counsel is insufficient to raise a triable issue of fact on its claim for an account stated.

Although not directly raised by the parties, the threshold issue to be decided by this court is whether ECBA's claim for an account stated is an appropriate basis for a motion under CPLR 3213. CPLR 3213 states that a motion for summary judgment in lieu of a complaint may be served by the plaintiff "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment." The purpose of this motion is to provide "an effective means of obtaining an accelerated judgment where a defendant's liability for a certain sum of money is clearly established by the instrument, coupled with proof of nonpayment." Wagner v. Cornblum, 36 A.D.2d 427, 428 (4th Dept 1971); See also, Holmes v. Allstate Ins. Co., 33 A.D.2d 96, 98 (1st Dept 1969).

²Rose also argued that this action should be stayed based on ECBA's motion for reargument in connection with a motion to compel arbitration of the parties' fee dispute and that this action should be consolidated with an action commenced by Rose against ECBA in the Supreme Court, Queens County. At oral argument, counsel for Rose acknowledged that these arguments were moot since ECBA's motion for reargument had been resolved and Rose had decided not to pursue the Queens County action.

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“A plaintiff makes out a prima facie case for summary judgment in lieu of complaint by proof of an instrument and the defendant’s failure to make payment according to its terms.”

Seaman-Andwall Corp. v. Wright Mach. Corp., 31 AD2d 136 (1st Dept 1968), aff’d, 29 NY2d 617 (1971). The device of summary judgment in lieu of a complaint is unavailable “where there are other issues and considerations presented by the writing.” Kerin v. Kaufman, 296 A.D.2d 336, 337 (1st Dept. 2002). See also, Weisman v. Sinorm Deli, Inc., 88 N.Y.2d 437 (1996).

Under this standard, the instant case does not qualify for CPLR 3213 treatment since ECBA relies on an implied account statement rather than a written instrument subscribed by Rose in which Rose agreed to pay the amount due and owing. Interman Industrial Products, Ltd. v. R.S.M. Electron Power, Inc., 37 NY2d 151, 155-156 (1975); see also, Emperor Industries, Inc. v. Rothbaum, 17 Misc3d 1125(A) (Sup Ct NY Co. 2007)(denying motion for summary judgment in lieu of complaint on an account stated where the amount of the balance could not be determined without reference to outside proof); 97 NYJur2d Summary Judgment and Pretrial Motions to Dismiss § 103 (noting that summary judgment in lieu of complaint on an account stated based on implied consent cannot be granted as there is no instrument for payment of money only); compare, Anthony M. Barraco, P.C. v. Rosendale, 162 AD2d 899 (3d Dept 1990)(summary judgment in lieu of complaint could be used to recover legal fees based on signed letter from the defendant client to an escrow agent acknowledging that the attorney’s final bill was accurate and authorizing escrow agent to pay the sum to principal of the law firm); Rhee v. Meyers, 162 AD2d 397 (1st Dept 1990)(agreement in writing to pay a fixed obligation, together with periodic statements reflecting history of transactional activity, constituted an

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obligations for the payment of money only for the purposes of CPLR 3213).³ In this regard, the retainer agreement, while setting forth the terms of payment, is not an written instrument for the payment of money only since it does not include a specific amount of money.

As this action is not grounded in an express agreement to pay but rather upon an implied account stated, ECBA's motion for summary judgment in lieu of complaint must be denied. This denial is without prejudice to ECBA move for summary judgment after Rose answers the formal complaint filed in this action as directed below.

Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that the ECBA shall serve a formal complaint upon Rose's attorney within 30 days of the date of this order, a copy of which is being provided by my chambers to counsel for the parties; and it is further

ORDERED that a preliminary conference shall be held in Part 11, room 351, 60 Centre Street, on January 27, 2010 at 9:30 am.

Dated: November 23 2010



J.S.C.

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³While, ECBA relies on Ruskin, Moscou, Eyans & Faltischek, P.C. v. FGH Realty Credit Corp., 228 AD2d 294 (1st Dept 1996), that case does not involve a motion for summary judgment in lieu of complaint.