Index No.:CV-037337/10

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK:

DECISION/ORDER
HON. ANDREA MASLEY

FROSS ZELNICK LEHRMAN & ZISSU, PC,
Plaintiff

-against-

MICHAEL M. FARO A/K/A MOTA FARO, KINGRIDGE, LLC and UNORTH LLC D/B/A KINGRIDGE,
Defendants.

Plaintiff Fross, Zelnick, Lehrman & Zissu, PC, a law firm specializing in intellectual property, filed this action on July 7, 2010 alleging breach of contract, account stated and unjust enrichment and seeks unpaid legal fees in the amount of $10,275.70. Defendants' answer includes a counterclaim for $2,500, the amount of an arbitration award. The trial began on November 29, 2011, continued on February 8, 2012 and concluded on May 22, 2012 at which Robert Becker, Esq., a partner of plaintiff law firm, and Shane Hardy, Esq., Canadian counsel, testified for plaintiff and Michael Faro testified for defendants.

Mr. Faro contacted plaintiff in March 2007. On March 15, 2007, Mr. Becker sent the retainer agreement to Mr. Faro by email and stated "The retainer is intended to cover our analysis and discussion of options regarding possible remedies for the withdrawal of the KINGRIDGE.COM domain name from the client. If the retainer amount is not used up when we have given you our opinion on your options, and if you do not choose to move forward, we will refund the unused amount. If you wish to move forward at that point, it may be necessary to replenish the retainer." The retainer agreement provides:

Client is responsible for payment of any expenses properly and

> reasonably incurred on behalf of Client, including reimbursement of all disbursements advanced by FZLZ. Such expenses are likely to include, but are not limited to, photocopying and facsimile charges, long distance telephone calls, travel expense, computer research charges, charges for search reports prepared by outside vendors such as Thomson & Thomson, investigator charges, expert witnesses fees and local counsel charges. Costs exceeding $1,000, such as expert witness fees, deposition costs, and local counsel fees, may be billed directly, for which Client will make prompt, direct payments to the vendor.
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> * * *
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> Any unused portion of the retainer shall be returned to Client promptly upon the conclusion of the matter or upon termination or withdrawal from this engagement.

Client is defined as "KingRidge, LLC (referred to hereafter as 'Client')."

The parties had a phone conference on March 22, 2007. Mr. Faro next communicated on September 6, 2007 by email. Mr. Becker responded that the file was closed and the bill for $614.50 written off since plaintiff had not heard from defendants. On October 30, 2007, KingsRidge LLC paid a $7,500 retainer. In November, defendants forwarded files to plaintiff.

Plaintiff sent defendants an invoice dated November 27, 2007 for $790.

Plaintiff explained defendants' options in two detailed emails to Mr. Faro on November 28, 2007.

On November 28, 2007, Mr. Faro responded "let's engage the Canadian [counsel] to get the information then we can make the call." On November 29, 2007, Mr. Becker wrote that he would like to retain Shane Hardy's Canadian law firm which was conducting a conflicts check.

On November 29, 2007, Mr. Becker informed Mr. Faro that the Cassels Brock firm had no conflict. Mr. Faro responded immediately "Awesome."

On November 29, 2007, Mr. Becker sent the following email to Mr. Faro:

> "I have explained the situation to Shane, and he will look at the issue of whether the client, as a good faith purchaser for value, is entitled to the domain name. They will report back to me next week. Depending on whether they find, we may also need them to assess the other claim I mentioned to you yesterday: whether the client has a valid claim against the stable that their negligence in supervising their employee and not changing the administrative contact caused the client damages. But I'll get their report on the first question and discuss it with you before we decided whether to have Cassales Brock look at the second question."

Plaintiff sent an invoice dated December 6, 2007 for $4,481.28.

In an email to Mr. Becker dated December 12, 2007, Mr. Faro wrote "Also can you please let me know prior to maxing out retainment [sic]."

On December 17, 2007, Mr. Becker sent Mr. Faro by email an estimate of costs "from this point forward." He estimated an additional $400 to edit a letter already drafted by Mr. Hardy to be signed by Mr. Hardy and sent to Seymour Epstein of Epstein Equestrian Enterprises, the entity allegedly using defendant's domain name. In addition, Mr. Becker wrote "Please let me know whether you would like us to go ahead with the letter. If so, I will send you the draft letter. As I said on the phone, we would need you to send an additional retainer of $10,000 before Shane would actually send the letter to Mr. Esptein."

By email dated January 2, 2008, Mr. Becker reminded Mr. Faro that he was awaiting a response.

By email dated January 6, 2008, Mr. Faro responded:

> "After talking to my peers and corporate attorney, and based on the information we discussed, . . . we believe our chance of recovering the domain name at this point is slim to none . . . so we are considering to pull the plug and cut our losses, as there just doesn't' seem to be any point to continue. . . I would like to thank you for your time and assistance on this case as your clear directions helped us to make a better decision and I hope we can work on other cases in the future. Also, please let me know what amount of retainment [sic] is unused."

The bill sent to plaintiff for $6,570.94 from Cassels Brock is dated January 15, 2008.

By email dated February 5, 2008, Mr. Becker wrote to Mr. Faro "Attached is our invoice for work from the beginning of December. As you will see, the amount owing is $10,275.70. This amount includes Shane Hardy's bill for the Canadian work done by his firm ($6,598.00).[1] We have also subtracted the amount of the retainer that remained, which was $2,228.72."

By email dated April 15, 2008, to Mr. Faro, Mr. Becker wrote "the attached invoice for $10,275.70 has been outstanding for over two months. We would appreciate prompt payment." Barbara Solomon was copied on this email.

Plaintiff's employee Kim Turner sent to Mr. Faro reminder emails requesting payment dated April 21, 2008 and June 4, 2008. Barbara Solomon was copied on these emails.

On July 7, 2008, Mr. Faro sent Ms. Turner an email wherein he states "This was never authorized, and per our agreement with Rob, that he explicitly assured me of, it must never have exceeded our initial payment 'without prior authorization' from myself directly - which I never ever gave. This is not acceptable."

In an email to Mr. Faro dated July 8, 2008, Mr. Becker sent a detailed history of the parties' relationship.

Mr. Becker and Mr. Hardy testified credibly that they performed the services or supervised those who did perform the services set forth on the invoices. Mr. Becker credibly denied promising Mr. Faro that the cost would not exceed $7,500. Mr. Becker

[1]The amount billed was $6,508.95 and thus damages are reduced by $27.06.

believed that the Canadian counsel's opinion was necessary. Plaintiff has paid the Canadian firm. At trial, Mr. Hardy identified the employees of his firm assigned to work on this account, reviewed the hours billed and rates charged.

Mr. Faro testified that he is the managing member of defendant Unorth LLC d/b/a Kingridge and was the managing member of Kingridge LLC. He admitted that he never objected to the invoices. Instead, in February or March, he called Ms. Solomon whom he believed to be Mr. Becker's boss. He testified that she promised to investigate. He did not respond to Ms. Turner's communications or Mr. Becker's letter because he believed Ms. Solomon was working on it. Ms. Solomon was copied on all emails.

Plaintiff has established an account stated. "An account stated is an agreement between parties to an account based upon prior transactions between them" with respect to the correctness of the account items and balance due. *Marino v Watkins*, 112 AD 2d 511, 512 (3d Dept 1985). An agreement between the parties can be inferred by receipt of invoices and failure to object for an unreasonable amount of time. *Jim-Mar Corp. v Aquatic Constr.*, 195 AD 2d 868, 869 (3d Dept), *leave to appeal denied*, 82 NY2d 660 (1993). The court finds Mr. Faro's testimony regarding his February or March call to Ms. Solomon incredible. There is no other evidence of such a conversation. Further, Mr. Faro's stated belief that Ms. Solomon was working on it was undermined by the fact that she was copied on invoices dated April 15, April 21, June 4 and July 8, 2008. Rather, the court finds Mr. Faro's first objection came on July 7, 2008. A five month delay in objecting constitutes assent. *Shea & Gould v Burr*, 194 AD2d 369, 371 (1st Dept 1993)(five months too long); *Engel v Cook*, 198 AD2d 88, 89 (1st Dept 1993)(four and a half month delay constitutes assent).

The court also finds that defendants breached the contract by failing to pay plaintiff for services it provided to defendants. Plaintiff promised to provide "analysis and discussion of options" and it did just that on November 27, 2007. One of those options was to engage Canadian counsel. The court rejects Mr. Faro's denial of authorization as belied by his email "Awesome."

Mr. Faro insists that he authorized plaintiff to hire local counsel, not foreign counsel. The Canadian firm is both foreign and local counsel. "Local counsel" means local to the proceeding. Here, it is undisputed that the transgressor was located in Canada. Clearly, the retainer agreement and Mr. Faro authorized plaintiff to engage Canadian counsel and defendant's objection to foreign over local counsel is a distinction without a difference. This argument is also contradicted by defendants' argument that Mr. Faro authorized engaging the Canadian firm, but to consult only.

Mr. Faro expected to receive about $2,000, the balance from the $7,500 retainer. He believed that after the December 6, 2007 bill showing a balance of $4,470.50 remaining in the retainer, there was but one letter and one phone conversation for which he would be billed. The December bill had no charges for the Canadian firm. Rather, the Canadian firm did not render its bill until January 15, 2008.

The court rejects Mr. Faro's calculation. If Mr. Faro is to be believed, then Canadian counsel was working for free. Mr. Faro insists that he authorized plaintiff to engage Canadian firm to consult only. He believed this meant, get the information and make a decision without charge. Mr. Faro explained that "in my mind" there is a distinction between consulting versus actual legal work. Mr. Faro is either naive or not credible. In either case, he authorized engagement of Canadian counsel and defendants must pay for the services they received.

Mr. Faro now denies that he authorized drafting a letter for which plaintiff charged $2,538.50 for work performed on December 10 and 11, 2007. Mr. Faro's objection is undermined by his failure to object to Mr. Becker's December 17, 2007 email in which Mr. Becker states "the letter to Seymour Epstein that we drafted" required some editing which would cost about $400.

Mr. Faro admitted there is no written provision in the retainer agreement that plaintiff may not exceed $7,500. Mr. Faro insisted he had a conversation with Mr. Becker in March 2007 which he testified was a "levelset" during which he stated his expectation that he would receive notice before billing exceeded $7,500. Mr. Becker credibly denied having been informed of such a limitation. The court rejects Mr. Faro's testimony of setting such a "levelset" as not credible.

The court finds the fees charged to be reasonable. Twelve factors are relevant to the inquiry of whether attorneys' fees are reasonable:

> "(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases."

Hensley v Eckerhart, 461 US 424, 430 (1982). The court finds plaintiff has established that its invoices reflect the reasonable time and labor expended. Clearly, Mr. Faro sought plaintiff's advice because of its expertise in this area of law. Plaintiff's hourly rates are consistent with its expertise and the rates charged in New York. The court rejects Mr. Faro's objection to charges for phone calls. Page 2 of the retainer states

that "billable time will include telephone . . . conferences." Charging for phone calls and the amount billed for those calls here is reasonable.

The retainer agreement is clearly with KingRidge LLC, not Mr. Faro personally.

The arbitration award is not relevant to this proceeding. 22 NYCRR Part 137.

The claim for quantum meruit is dismissed as redundant.

Accordingly, it is

ORDERED that plaintiff shall have judgment for $10,248.64 ($10,275.70 less 27.06, the difference between $6,598 and $6,570.94) against KingRidge LLC and Unorth LLC d/b/a KingRidge with interest from April 15, 2008, costs and disbursements; and it is further

ORDERED, that the action is dismissed against Mr. Faro; and it is further

ORDERED, that defendants' counterclaim is dismissed.

This constitutes the decision and order of the court. The clerk shall enter judgment accordingly.

Dated: July 11, 2012

Andrea Masley, Civil Court Judge

☒ mailed to plaintiff/petitioner July 12, 2012 (date mailed)
☒ mailed to defendant/respondent July 12, 2012 (date mailed)
☐ mailed to other _____ (date mailed)
☐ mailed to other _____ (date mailed)