

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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CONSTANTINE CANNON LLP,

Plaintiff,

Index No. 118030/09

-against-

DECISION/ORDER

HOWARD L. PARNES, ELAINE PARNES,
FRANCINE PARNES, PARNES FAMILY
LIMITED PARTNERSHIP, PARNES FAMILY
CORP., FP CONSULTING LLC, SYCAMORE
CONSULTING SERVICES, INC., and
ESTATE OF SEYMOUR PARNES,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover legal fees, plaintiff Constantine Cannon LLP (“plaintiff”) moves for an order, pursuant to CPLR §3211(a)(7) and (b), to dismiss the first and second affirmative defenses and counterclaims of defendants Howard L. Parnes, Elaine Parnes, Francine Parnes, Parnes Family Limited Partnership, Parnes Family Corp., FP Consulting LLC, Sycamore Consulting Services, Inc., and Estate of Seymour Parnes (collectively “defendants”).

Background

In its Complaint, plaintiff alleges that on or about September 11, 2008, Kevin Matz (“Mr. Matz”) joined plaintiff as of counsel. Prior to joining plaintiff, Mr. Matz practiced at White & Case, where he provided defendants with trusts and estates and corporate counseling services. While with plaintiff, Mr. Matz continued to provide defendants with the same kind of legal services. Francine Parnes (“Ms. Parnes”), an attorney admitted to practice in the State of New York, oversaw the Parnes family’s legal matters, and regularly communicated with Mr. Matz

regarding the work plaintiff performed for defendants. All invoices were addressed to her.

Plaintiff alleges that its invoices to defendants were carefully itemized, with each entry containing the date, amount of time, and a detailed description of the work performed, as well as the attorney's name and billing rate. Mr. Matz, as the billing partner on defendants' matters, reviewed each invoice before it was sent out, and his administrative assistant addressed and mailed each invoice to Ms. Parnes *via* first class mail (*see* the "invoices"). From September 2008 through February 2009, plaintiff provided defendants with approximately \$630,000 worth of legal services, and defendants paid the invoices for those services without protest.

On or about May 6, 2009, plaintiff mailed Ms. Parnes two invoices dated April 30, 2009, in the amounts of \$103,709.39 and \$54,803.10. These invoices were received by Ms. Parnes, but never paid, plaintiff contends.

On or about May 12, 2009, Mr. Matz informed Ms. Parnes that he had given plaintiff two weeks' notice that he would open his own firm. Mr. Matz started the law firm Kevin Matz & Associates PLLC on or about May 20, 2009.

On or about May 21, 2009, plaintiff mailed to Ms. Parnes three invoices dated May 20, 2009 in the amounts of \$122,385.53, \$62,402.50, and \$22,241.50 for legal services rendered from April 1, 2009 through May 18, 2009.

On or about May 28, 2009, plaintiff e-mailed Ms. Parnes copies of the April 30, 2009 and May 20, 2009 invoices. Although Ms. Parnes received said invoices, they were never paid. The outstanding invoices, totaling \$359,084.74 (after a \$6,457.28 discount, due to plaintiff's decision to cap defendants April fees and disbursements at \$160,000), were for legal services of the same general kind that plaintiff previously rendered to, and were paid for by defendants (*see* the

“unpaid invoices”).

On May 28, 2009, Ms. Parnes sent an e-mail to Mr. Matz’s former e-mail address stating that she was initiating cost-cutting efforts to reduce her legal fees.

On August 13, 2009, plaintiff sent Ms. Parnes an e-mail reminding her of defendants’ outstanding invoices.

On September 2, 2009, Benjamin Needell (“Mr. Needell”), an attorney purporting to represent Howard Parnes and the Parnes Family Limited Partnership, responded to plaintiff’s e-mail, claiming that defendants “question much of the work that was claimed to have been done by [plaintiff],” and that “they believe the Parnes family was significantly overcharged in the past.” However, plaintiff alleges that Mr. Needell did not specify any questionable bills or overcharges, and that prior to Mr. Needell’s September 2, 2009 e-mail, defendants never objected to any of plaintiff’s invoices.

As its first cause of action for an account stated, plaintiff alleges that defendants received all of its invoices, and, without objection, paid in full nine such invoices, covering services rendered September 2008 through February 2009. Five invoices remain unpaid: two invoices dated April 30, 2009 in the amounts of \$103,709.39 and \$54,803.10, and three invoices dated May 20, 2009, in the amounts of \$122,385.53, \$62,402.50, and \$22,241.50, less a courtesy discount of \$6,457.28. Plaintiff further alleges that defendants received and retained the five unpaid invoices – totaling \$359,084.74 – without objection until September 2, 2009. Thus, defendants failed to object to the invoices within a reasonable amount of time.

As its second cause of action for *quantum meruit*, plaintiff alleges that from March 2009 through May 2009, it rendered legal services to defendants in good faith with the expectation of

full compensation therefor. The amounts contained in the unpaid invoices reflect the reasonable value of plaintiff's legal services. At no point prior to September 2, 2009 did defendants express any opinion that the amounts billed did not reflect the reasonable value of plaintiff's legal services, plaintiff contends.

As a result, plaintiff seeks to recover \$359,084.74, plus interest, on its first and second causes of action, and punitive damages for defendants' "malicious, outrageous and wanton disregard" of plaintiff's rights.

In its Answer, defendants' "first affirmative defense and counterclaim" allege that plaintiff failed to issue defendants a written letter of engagement, pursuant to 22 NYCRR §1215.1. Therefore, plaintiff is barred from collecting a fee, and defendants are entitled to judgment against plaintiff for the full amount of all fees paid: \$627,845.31. Defendants' "second affirmative defense and counterclaim," allege that plaintiff "vastly overcharged" for its services, for example, charging for the time of persons apparently not admitted to the New York bar at the same hourly rate as admitted lawyers. Defendants contend, for example, that while Sam Sim ("Mr. Sim") billed at a rate of \$300 per hour, his name does not appear in the New York State attorney database. Further, Mr. Sim does not appear on plaintiff's web site as a lawyer. Upon information and belief, Mr. Sim was not a member of the New York bar, or any state bar, at any time between September 1, 2008 and May 31, 2009. Therefore, Mr. Sim's work constitutes the unauthorized practice of law under Judiciary Law §478, defendants contend.

Defendants allege that Judiciary Law §484 prohibits the receipt of compensation for the unauthorized practice of law, and §485 makes a violation of §478 or §484 a misdemeanor. As plaintiff engaged in the unauthorized practice of law with respect to defendants, it may not

apportion its wrong so as to recover for legal work done by admitted lawyers or recover for legal work done by non-admitted persons. Plaintiff never disclosed that plaintiff was using non-admitted personnel to practice law on defendants' matters; nor was it disclosed that non-admitted personnel were being charged at the same rate as admitted lawyers. Defendants did not consent to the use of non-admitted personnel for tasks that should have been assigned to lawyers. Thus, defendants are entitled to judgment dismissing the action and granting them judgment against plaintiff for \$627,845.31.

In support of dismissal of defendants' claims, plaintiff first argues that defendants' first affirmative defense and counterclaim fail to state a cause of action or a meritorious defense. Citing caselaw, plaintiff contends that its alleged failure to provide a written engagement letter, pursuant to 22 NYCRR §1215.1, neither bars the recovery of attorneys' fees on an account stated or *quantum meruit* basis, nor provides a basis for the disgorgement of attorneys' fees paid. Plaintiff further contends that under 22 NYCRR §1215.2(b), a statutory exception to the engagement letter rule, where an attorney's services are of the same general kind as previously rendered to and paid for by the client, the risk of a misunderstanding regarding the scope of representation and terms of payment is minimal. Here, there was no misunderstanding between plaintiff and defendants. All of the uncompensated work that plaintiff performed for defendants was of the "same general kind" – namely, trusts and estates and corporate counseling legal services – as the work that plaintiff rendered to defendants for which they voluntarily paid the firm more than \$630,000 in fees, plaintiff argues. The work was also of the "same general kind" that Mr. Matz rendered to, and was paid for by, defendants while he worked at White & Case. Moreover, plaintiff argues, as an admitted New York attorney, Ms. Parnes has a level of

understanding and sophistication over and above that of a layperson, and cannot credibly claim that there was any misunderstanding among plaintiff and defendants regarding the scope of representation and terms of payment.

Second, plaintiff argues that defendants' second affirmative defense and counterclaim fail to state a cause of action. Defendants' claims that plaintiff engaged in the unauthorized practice of law by billing defendants for the work performed by Mr. Sim, and that plaintiff overcharged defendants are defective and cannot provide a basis for disgorgement, plaintiff argues. Citing the affirmations of Alysia A. Solow ("Ms. Solow"), a partner in plaintiff, and David A. Scupp ("Mr. Scupp"), who is associated with plaintiff, plaintiff contends that Mr. Sim is, and was at all relevant times, an attorney admitted to practice in New York State. Mr. Sim, registered under the name "Tzi Yong Sim," was admitted to practice on September 8, 2008. He was hired by plaintiff's legal staffing affiliate in December 2008 and is the "Sam Sim" referred to on the invoices provided to defendants. Thus, defendants' accusation that plaintiff billed defendants for tasks performed by an unlicensed attorney is false.

Plaintiff further argues that although defendants can assert their second affirmative defense to plaintiff's claim for *quantum meruit* regarding the *unpaid* invoices, the "voluntary payment doctrine" bars the recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law. Here, defendants had full knowledge of all of the task descriptions, rates, and time details that defendants now claim to suddenly realize were improper. Further, the only fraud or deception that defendants allege is the false claim that Mr. Sim was not a licensed attorney. Defendants simply fail to allege anything short of full disclosure. Any supposed overcharges that defendants now realize were contained

in the paid invoices were there when defendants voluntarily paid them. Defendants' alleged lack of diligence cannot overcome the voluntary payment doctrine, plaintiff argues.

In opposition, regarding their first affirmative defense and counterclaim, defendants argue that plaintiff's failure to issue an engagement letter relegates plaintiff to a *quantum meruit* claim. Defendants contend that 22 NYCRR §1215.2(b) applies when a client brings to his lawyer a new matter of the same kind that he has brought to the lawyer previously; under such circumstances, there should be no surprises about fees or billing. However, the exception does not apply when a lawyer changes firms, as herein, defendants contend. A client who was serviced by one firm may not be serviced or billed in the same way by a second firm, even when the individual lawyer with whom the client works has moved from the first firm to the second. Plaintiff supplied no case or rule to show that 22 NYCRR §1215.2(b) relieves the requirement of an engagement letter when a lawyer changes firms, defendants argue. Given that the burden of proof is always on the lawyer to show the appropriateness of his conduct with respect to his billing, plaintiff should be held not to have satisfied 22 NYCRR §1215.2(b).

Further, defendants deny plaintiff's contention that Mr. Matz performed the same work for defendants at plaintiff that he had previously performed at White & Case. Plaintiff failed to provide an affidavit from anyone attesting that Mr. Matz did the same work for defendants at both firms. Defendants further contend that several different lawyers' names appear on plaintiff's invoices to defendants. Even if Mr. Matz performed the same services for defendants at both firms, and even if plaintiff is somehow excused from the letter of engagement requirement as to Mr. Matz, plaintiff failed to show that the other lawyers worked previously at White & Case, worked for defendants, or did the same type of work for defendants that they did

while working for plaintiff. Plaintiff has no excuse for not providing an engagement letter for the work done by those other lawyers, defendants argue.

Further, defendants contend that a claimant may recover in *quantum meruit* only when he has no contract. Plaintiff's advocacy of *quantum meruit* recovery and the absence of an engagement letter mean that plaintiff is limited to *quantum meruit*, defendants argue. *Quantum meruit* permits recovery of only as much as a claimant deserves, which is to be measured at trial.

Defendants argue that their second affirmative defense and counterclaim sufficiently state a claim that plaintiff overcharged as to fees paid and fees charged but not paid by defendants, entitling defendants to the return of some or all fees paid. Defendants contend that the only two questions the Court must consider before denying plaintiff's motion are (1) whether the counterclaim and affirmative defense are sufficient under CPLR §3013, which governs the particularity of pleadings, and (2) whether there is a legal bar to the counterclaim and affirmative defense. If there is any doubt as to the sufficiency of the counterclaim and affirmative defense, that doubt is to be resolved in defendants' favor. If the Court finds the counterclaim and affirmative defense insufficient, then defendants seek leave to replead.

In their second counterclaim and affirmative defense, defendants allege that throughout the eight-month course of their attorney-client relationship, plaintiff charged for unnecessary or duplicative work, charged for excessive time in amounts and at charges far greater than a reasonably competent and experienced lawyer would or should have required for the task, and charged "lawyer prices" for tasks that could have and should have been performed by non-lawyers in less time, at lower cost. As a matter of pleading, defendants have sufficiently stated a claim within the bounds of CPLR §3013, defendants argue.

Defendants further argue that Mr. Sim's admission or non-admission to the New York bar is immaterial. Whatever Mr. Sim's true name and identity, defendants have adequately alleged overcharging by him and his colleagues. The parties can explore in discovery what services were rendered and the charges therefor, and the Court will determine the reasonableness of plaintiff's charges at trial. Thus, plaintiff's motion should be denied, and discovery should proceed.

Defendants further argue that the voluntary payment doctrine does not apply where a lawyer overcharges a client. None of plaintiff's cases involves a lawyer-client fee dispute; instead they involve arm's length commercial transactions. A claim for overcharges and overpayment between lawyer and client is a recognized cause of action in New York, defendants contend. Pursuant to 22 NYCRR §1200.5, lawyers in New York are prohibited from charging excessive fees. When the client has paid an excessive fee, the client may sue to recover the fee paid, and the lawyer must establish that the compensation charged and paid was fair and reasonable, defendants contend. The Court, which has the power to examine a fee arrangement, the charges made by the lawyer, and the fees paid by a client to determine their reasonableness, is the ultimate expert in determining a proper fee, defendants argue.

In reply, plaintiff contends that defendants concede that their first affirmative defense and counterclaim should be dismissed. Citing additional caselaw, plaintiff contends that the lack of an engagement letter does not entitle a client to disgorgement of attorneys' fees already paid. Plaintiff contends that as defendants' opposition is silent as to this rule, defendants concede that the absence of an engagement letter does not provide defendants with a basis to recover fees already paid.

Plaintiff further contends that defendants concede that a lack of an engagement letter does

not provide an affirmative defense to a claim for the recovery of fees on an account stated or *quantum meruit* basis. In fact, defendants concede that plaintiff may recover fees on a *quantum meruit* basis, even without an engagement letter. Moreover, defendants do not dispute that a party may recover on an account stated basis without an engagement letter. Thus, there is no disagreement that plaintiff may recover on all of its claims because the only claims alleged are those for *quantum meruit* and an account stated. The lack of an engagement letter is irrelevant. Given defendants' concessions that the lack of an engagement letter cannot provide the basis for disgorgement of fees already paid and does not prevent a law firm from recovering fees on an account stated or *quantum meruit* basis, the statutory exception to the engagement letter requirement is now of little moment, plaintiff argues.

Plaintiff further contends that defendants admit that all of the uncompensated work performed by plaintiff for defendants was of the same general kind (specifically, trusts and estates counseling and corporate counseling) as the work that plaintiff rendered to defendants for which they voluntarily paid the firm over \$630,000 in fees. Therefore, pursuant to the exception in 22 NYCRR §1215.2(b), an engagement letter is not required for plaintiff to recover the remainder of its fees. Plaintiff further contends that defendants cite no authority for the proposition that 22 NYCRR §1215.1 applies where an attorney working at one firm moves to another firm and continues to serve a client without a new engagement letter. In any event, such argument is academic; 22 NYCRR §1215.2(b) would still apply in light of the compensated work that plaintiff previously rendered to defendants, plaintiff argues.

Plaintiff further maintains that the voluntary payment doctrine bars defendants' recovery of funds already paid to plaintiff. Plaintiff contends that it is undisputed that defendants

voluntarily paid plaintiff \$630,000 in fees with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law. Plaintiff further argues that there is no legal fees exception to the voluntary payment doctrine. None of the cases defendants cite regarding the recovery of excessive fees addresses the voluntary payment doctrine or concerns a client who voluntarily paid a fee, with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law, plaintiff contends. Otherwise, plaintiff contends, there would be a chilling effect on the provision of legal services, and even the most sophisticated former clients (such as admitted attorneys like Ms. Parnes) would seek to claw back fees rightfully earned, regardless of the circumstances, whenever a law firm seeks to collect outstanding fees.

Discussion

The standard on a motion to dismiss a pleading or defense for failure to state a cause of action, pursuant to CPLR §3211(a)(7), is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997]). “While it is true that . . . the court must presume the facts pleaded to be true and must accord them every favorable inference, factual allegations that do not set forth a viable cause of action, or that consist of bare legal conclusions, are not entitled to such consideration (*Delran v Prada USA, Corp.*, 23 AD3d 308 [1st Dept 2005] [citations omitted]). Further, where the bare legal conclusions and factual allegations are contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept

1999], *affd* 94 NY2d 659 [2000]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept], *lv denied* 89 NY2d 802 [1996]), and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Leon v Martinez* at 88; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]).

In addition, CPLR §3211(b) provides that a “party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.” The “standard of review on a motion to dismiss an affirmative defense pursuant to CPLR 3211(b) is akin to that used under CPLR 3211(a)(7), *i.e.*, whether there is any legal or factual basis for the assertion of the defense. The truth of the allegations must be assumed, and if under any view of the facts a defense is stated, the motion must be denied” (*Matter of Ideal Mutual Ins. Co. v Becker*, 140 AD2d 62, 67 [1st Dept 1988] [citation omitted]). Further, statements that will not defeat, mitigate or reduce the plaintiff’s remedy are insufficient as a defense (see NY Jur, Pleading §138; *Walsh v Judge*, 223 AD 423, 425 [1st Dept 1928]).

Defendants’ First Affirmative Defense and Counterclaim

In determining whether defendants’ first affirmative defense and counterclaim state a defense to plaintiff’s account stated or *quantum meruit* claims and a claim for disgorgement, the Court first considers whether plaintiff’s alleged failure to issue defendants a written letter of engagement, pursuant to 22 NYCRR §1215.1, bars plaintiff from recovering unpaid attorneys’ fees.

The rule covering engagement letters provides in relevant part: “[A]n attorney who

undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter” (22 NYCRR §1215.1).

At the outset, the Court notes that plaintiff’s argument that its services to defendants fell within an exception to the engagement letter rule lacks merit. The exception provides in relevant part that the engagement letter rule “shall not apply to . . . representation where the attorney’s services are of the same general kind as previously rendered to and paid for by the client” (22 NYCRR §1215.2[b]). Caselaw indicates that 22 NYCRR §1215.2(b) applies to instances in which *the attorney or law firm* performs services for and *is paid* by a client and later performs similar services for the same client. For example, in *Silver Huntington Enterprises, LLC v Davidoff & Malito, LLP* (15 Misc 3d 266, 267-268, 832 NYS2d 748, 749 [Sup Ct New York County 2006]), the Court held that the defendant law firm made a *prima facie* showing that the services it rendered for the client plaintiff in the two separate actions were of the same general kind as previously rendered to and paid for by the client. The Court also noted that the defendant law firm had provided the Court with an engagement letter for its representation of the client in the first action that “sufficiently explains the scope of services, the fees to be charged and the billing practices as required by §1215.1” (*id.* at 268).

Here, plaintiff fails to allege that *it* previously rendered any services to client, prior to Mr. Matz’s joining the law firm on or about September 11, 2008 (Complaint, ¶¶19-20). Plaintiff also fails to allege that defendants paid plaintiff for any services prior to plaintiff’s hiring of Mr. Matz. While it is alleged that *Mr. Matz* provided defendants with legal services while an attorney at *White & Case*, and the same services after he joined plaintiff, Mr. Matz is not a party

to the instant action, suing to recover attorneys' fees. Therefore, the exception to the engagement letter rule does not apply to plaintiff, and plaintiff was required to provide an engagement letter.

However, a law firm's "failure to comply with the rules on retainer agreements (22 NYCRR 1215.1) does not preclude it from suing to recover legal fees for the services it provided" (*Miller v Nadler*, 60 AD3d 499, 500 [Sup Ct New York County 2009], citing *Egnotovitch v Katten Muchin Zavis & Roseman LLP*, 55 AD3d 462, 464 [1st Dept 2008]; *Nicoll & Davis LLP v Ainetchi*, 52 AD3d 412 [1st Dept 2008]; *Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54, 63-64 [2d Dept 2007]). The First Department explains in *Nabi v Sells* (70 AD3d 252, 253-254 [1st Dept 2009]): "Against the client's unqualified right to terminate the attorney-client relationship is balanced the notion that a client should not be unjustly enriched at the attorney's expense or take undue advantage of the attorney, and therefore the attorney is entitled to recover the reasonable value of services rendered." Further, the caselaw does not distinguish between the recovery of fees under a theory of *quantum meruit* or an account stated. Instead, this Court has held that [22 NYCRR §1215.1] "contains no provision stating that failure to comply with its requirements bars a fee collection action. Indeed, the regulation is silent as to what penalty, if any, should be assessed against an attorney who fails to abide by the rule" (*Morgan, Lewis & Bockius LLP v IBuyDigital.com, Inc.*, 2007 WL 258305, 1 [Sup Ct New York County 2007] [emphasis added]). Therefore, defendants' first affirmative defense fails to defeat plaintiff's account stated and *quantum meruit* claims.

As to defendants' first counterclaim for the disgorgement of fees, caselaw supports the position that the failure to comply with retainer rules may entitle a client to the disgorgement of attorneys' fees already paid, *if the client alleges that the fees were improperly earned*. The

Supreme Court engaged in a thorough discussion of this issue in *Matos v Kucker & Bruh, LLP* (2007 WL 4639455 [Trial Order] [Sup Ct New York County 2007]). *Matos* involved a legal malpractice action in which the defendant/attorney failed to provide the plaintiff with a retainer agreement, in violation of 22 NYCRR §1215.1, and the plaintiff sought, *inter alia*, to disgorge fees “unnecessarily charged.” In holding that the plaintiff had sufficiently stated a cause of action for the disgorgement of fees against the defendant attorneys, the Court in *Matos* explained:

[Courts] have held that the client may [not] use the attorney’s noncompliance [with 22 NYCRR §1215.1] . . . as a sword to compel disgorgement of fees already paid. This is particularly relevant with respect to plaintiff’s claim against [the defendants] since it appears that she has paid only a portion of the fees billed. . . . The issue has yet to be addressed by the First Department. . . . The Second Department [in *Seth Rubenstein, P.C. v Ganea, supra*] . . . ruled that the attorney discharged without cause was not precluded from recovering in *quantum meruit* the fair and reasonable value of the legal services provided, but did not address the issue of whether fees already paid were disgorgeable. That issue was determined by the Appellate Term, 9th & 10th Judicial Districts, in [Jones] v. Wright . . . where the court held that “while an attorney’s failure to comply with the provision does not entitle a client to a return of legal fees where the services have already been rendered . . . a client may seek to recover a fee already paid if it appears that the attorney did not properly earn said fee.” This appears to be consistent with the well established principles that an attorney who is discharged for cause does not have the right to recover legal fees, provided “the misconduct relates to the representation for which the fees are sought.” (Most citations omitted) (Emphasis added).

The Court in *Jones v Wright* (2007 WL 2247199, 1 [App Term 9th & 10th Jud Dists 2007]), which is cited by the *Matos* Court, stated:

Indeed, while an attorney’s failure to comply with the provision does not entitle a client to a return of legal fees where the services have already been rendered, *a client may seek to recover a fee already paid if it appears that the attorney did not properly earn said fee* [citing *Beech v Gerald B. Lefcourt, P.C.*, 2006 NY Slip Op 51092U, 4 (Civ Ct New York County 2006) (“While a client cannot maintain a cause of action for return of a legal fee based on noncompliance with Rule 1215.1, a client may seek recovery of the already paid fee grounded in a breach of contract theory, if an attorney did not properly earn any part of such fee”)]. (Emphasis added) (internal citations omitted).

Clearly, a violation of 22 NYCRR §1215.1, in and of itself, is not a ground for the disgorgement or refund of already paid attorneys fees.

Here, it is undisputed that plaintiff failed to provide defendants with an engagement letter.

However, in their first counterclaim, defendants merely state the text of 22 NYCRR § 1215.1 and contend that plaintiff “is barred from collecting a fee, and defendants are entitled to judgment against plaintiff for the full amount of all fees paid, \$627,845.31” (Answer, ¶¶ 33-36). Missing from this specific counterclaim is any allegation that plaintiff’s attorneys’ fees were improperly earned.¹ As plaintiff’s failure to comply with 22 NYCRR §1215.1 is not, in and of itself, a basis for disgorgement, defendants’ first counterclaim for disgorgement lacks merit.

The Court notes that in their moving papers, defendants fail to provide support for their first affirmative defense and counterclaim. Their attorney affirmation (the “Rothman Affm.”) focuses on how the *second affirmative defense and counterclaim* states “a claim that plaintiff overcharged as to fees paid and fees charged but not paid defendants, entitling defendants to the return of some or all fees paid and a defense against the claim for unpaid fees” (Rothman Affm., ¶¶ 3-4).² The affirmation goes on to quote the second affirmative defense and counterclaim, including the detailed allegations of overcharges (*id.* at 4; Answer, ¶¶ 37-45; 61-64). Notably

¹ Defendants only make such allegations in support of their second affirmative defense and counterclaim (*see* discussion, *infra*).

² The Court notes that the Rothman Affm. consistently refers to only one affirmative defense and counterclaim.

absent from the Rothman Affm. is any discussion of the first affirmative defense and counterclaim.

Defendants' MOL also focuses on the second affirmative defense and counterclaim, again quoting the allegations in full (*see* defendants' MOL, p. 7). The MOL goes on to discuss how the voluntary payment doctrine does not apply, and how a claim for overcharges and overpayment between lawyer and client is a recognized cause of action in New York. Importantly, defendants argue that "plaintiff's failure to issue an engagement letter [pursuant to 22 NYCRR §1215.1] relegates plaintiff to a *quantum meruit* claim" (*id.* at 13). However, defendants' theory regarding 22 NYCRR §1215.1 as stated in their MOL differs significantly from the theory in their Answer that 22 NYCRR §1215.1 entitles them to disgorgement. Further, defendants' MOL contains no caselaw in support of the claim that the mere failure to comply with 22 NYCRR §1215.1 requires the disgorgement of fees.

As defendants fail to allege sufficient facts in support of their first affirmative defense and counterclaim, plaintiff's motion to strike the first affirmative defense and counterclaim is granted.³

Defendants' Second Affirmative Defense and Counterclaim

The Court notes that in their opposition, defendants appear to abandon the first branch of

³The Court notes that, contrary to plaintiff's contention, the caselaw fails to demonstrate that the disgorgement of attorneys' fees already paid is "expressly foreclosed by settled law" (plaintiff's MOL, p.11). The cases plaintiff cites merely stand for the proposition that disgorgement is not necessary for *properly earned* attorneys' fees. For example, the Court in *Meyer, Suozzi, English & Klein, P.C. v Jeroboam, Inc.* (2007 WL 3325865 [Trial Order] [Sup Ct Nassau County 2007]) states: "Disgorgement *is not required* for failure to comply with written retainer rules" (emphasis added). *Meyer* cites *Mulcahy v Mulcahy* (285 AD2d 587 [2d Dept 2001]), a matrimonial case in which the Second Department held that "[w]here there is noncompliance with 22 NYCRR 1400.3, a court *need not* direct the return of a retainer fee already paid for *properly-earned services*" (emphasis added). *Mulcahy*, in turn, cites *Markard v Markard* (263 AD2d 470, 471 [2d Dept 1999]), in which the Second Department held that "where a retainer agreement fails to comply with the provisions of the matrimonial rules, *the*

their second affirmative defense and counterclaim contending that plaintiff engaged in the unauthorized practice of law because Mr. Sim was not a licensed attorney (*see opp.* ¶¶ 6-7). Defendants do not contest Ms. Solow's and Mr. Scupp's statements that Mr. Sim was, at all relevant times, an attorney admitted to practice in New York State. Therefore, the Court will consider the remaining branch of defendants' second affirmative defense and counterclaim, which seeks to dismiss plaintiff's claim for unpaid invoices and grant defendants a judgment for \$627,845.31, the amount they already have paid in attorneys' fees, based on improper overcharges.

court need not return fees properly earned by an attorney" (emphasis added).

As discussed in the section regarding the first affirmative defense and counterclaim, *supra*, the disgorgement of fees already paid may be warranted where the fees were paid for work improperly earned (*see also Matos and Jones, supra*). Here, in their second affirmative defense and counterclaim, defendants sufficiently allege that plaintiff's fees were improperly earned. Defendants allege that "[o]ne or another of the defendants made payments to plaintiff amounting to \$627,845.31 before realizing that plaintiff had vastly overcharged for its services" (Answer, ¶ 40). Defendants further allege that plaintiff overcharged it for unnecessary and duplicative work (*id.* at 41), and they cite several, specific examples of the alleged overbilling (*id.* at 42-45, 61-64). Therefore, the Answer indicates that there are legal and factual bases for defendants' second affirmative defense and counterclaim.⁴

As to whether defendants state a defense to plaintiff's account stated claim, it is well settled that where an account is made up and rendered, the one who receives it is bound to examine it, and, if the accounting is admitted as correct, it becomes a stated account and is binding on both parties, the balance being the debt which may be sued for and recovered by law (*Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745 [1st Dept 1983]). "An implicit agreement to pay . . . will arise from either the absence of any objection to a bill within a reasonable time or a partial payment of the outstanding bills" (*Paul, Weiss, Rifkind, Wharton & Garrison v Koons*, 4 Misc 3d 447, 450, 780 NYS2d 710, 712 [Sup Ct New York County 2004]; *see also Ruskin, Moscou, Evans, & Faltischek, P.C. v FGH Realty Credit Corp.*, 228 AD2d 294, 295 [1st Dept 1996] ["Defendant's receipt and retention of the plaintiff law firm's invoices

⁴As defendants have sufficiently stated a cause of action for the disgorgement of fees already paid, the parties' dispute regarding whether the voluntary payment doctrine applies herein is moot.

seeking payment for professional services rendered, without objection within a reasonable time, gave rise to an actionable account stated, thereby entitling the plaintiff to summary judgment in its favor”]).

In its Complaint, plaintiff concedes that defendants objected to the May 2009 invoices on September 2, 2009 (four months later) *via* an e-mail from Mr. Needell. Plaintiff further concedes that in the e-mail, defendants questioned the work performed by plaintiff and expressed concern that defendants had been “significantly overcharged in the past” (Complaint, ¶¶ 37-38, 54). In their Answer, as part of their second affirmative defense and counterclaim, defendants provide factual allegations in support of their objections to the unpaid invoices:

One example of plaintiff’s overcharges concerns the preparation of an IRS Form 1099 for an independent contractor for one of the defendants. In January 2009, associate Danielle Fischer, at a billing rate of \$300 per hour, spent 8.4 hours preparing that 1099, at a cost of \$2,520.

An accounting clerk could have and should have prepared the 1099 for a small fraction of what plaintiff charged.

Another example comes from the same month, January 2009, when someone named Sam Sim billed 79.8 hours to various tasks at \$300 per hour, at a total cost of \$23,940.

Sam Sim billed many more hours of time to defendants in months other than January 2009. In February 2009, for example, Sam Sim charged 73.05 hours, at a cost of \$21,015.

The number of hours charged on tasks, cumulatively and individually, whether or not plaintiffs personnel actually expended the time, is excessive.

For example, for the month of February 2009, plaintiff billed a total of 233.85 lawyer hours, 120.3 hours for Kevin Matz at \$650 per hour, 73.05 hours for Sam Sim at \$300 per hour, as stated above, and 40.5 hours for Danielle Fischer at \$300 per hour, all for “trusts and estates counseling.”

Outrageous as plaintiffs charges are in the aggregate, they are no less outrageous taken individually. For example, on February 9, 10, 11 and 12, Sim spent a total of 26.25 hours on the “review and analysis of partnership distributions,” for no readily apparent purpose. As another example, on February 2, Matz spent 7.5 hours on “estate planning and Global Agreement issues,” followed on February 3 by another 6.5 hours on “estate planning and Global Agreement issues,” followed on February 4 by an additional 6.5 hours on “estate planning and Global Agreement issues.” *This pattern is repeated throughout plaintiffs invoices before and after February 2009.*

(Answer, ¶¶ 42-45; 61-64) (emphasis added).

In accepting the facts alleged as true, and according defendants the benefit of every possible favorable inference (*Delran v Prada USA, Corp., supra*), the Court finds defendants' pleading to be sufficient as an affirmative defense to plaintiff's claim of an account stated.⁵

Finally, it is well settled that in order to recover in *quantum meruit*, an attorney must establish "performance, the work or services performed, the value thereof, and the nexus between the performance of the services and the liability to pay therefor" (*Cselle v Dalnoky*, 2005 WL 1713623 [App Term 2nd and 11th Jud Dists 2005]; 7 NY Jur 2d, Attorneys At Law §195). Here, in their second affirmative defense and counterclaim, defendants challenge the value of the services plaintiff performed. Therefore, defendants' pleading is also sufficient as an affirmative defense to plaintiff's claim of recovery based on *quantum meruit*.

Accordingly, plaintiff's second affirmative defense and counterclaim survive defendants' motion to dismiss.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion of plaintiff Constantine Cannon LLP, for an order, pursuant to CPLR §3211(a)(7) and (b), dismissing the first affirmative defense and counterclaim of defendants Howard L. Parnes, Elaine Parnes, Francine Parnes, Parnes Family Limited Partnership, Parnes Family Corp., FP Consulting LLC, Sycamore Consulting Services,

⁵ The Court does not reach the issue of whether defendants' objection to the unpaid invoices was timely, as the parties did not raise the issue.

Inc., and Estate of Seymour Parnes is granted; and it is further

ORDERED that branch of plaintiff's motion for an order, pursuant to CPLR §3211(a)(7) and (b), dismissing defendants' second affirmative defense and counterclaim is granted to the degree that any claims pertaining to the alleged unauthorized practice of law are dismissed, and is denied in all other respects; and it is further

ORDERED that counsel for plaintiff and counsel for defendant appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, August 31, 2010 at 2:15 p.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: July 22, 2010

Hon. Carol R. Edmead, J.S.C.

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion of plaintiff Constantine Cannon LLP, for an order, pursuant to CPLR §3211(a)(7) and (b), dismissing the first affirmative defense and counterclaim of defendants Howard L. Parnes, Elaine Parnes, Francine Parnes, Parnes Family Limited Partnership, Parnes Family Corp., FP Consulting LLC, Sycamore Consulting Services, Inc., and Estate of Seymour Parnes is granted; and it is further

ORDERED that branch of plaintiff's motion for an order, pursuant to CPLR §3211(a)(7) and (b), dismissing defendants' second affirmative defense and counterclaim is granted to the degree that any claims pertaining to the alleged unauthorized practice of law are dismissed, and is denied in all other respects; and it is further

ORDERED that plaintiff and defendants appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, August 31, 2010 at 2:15 p.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.