SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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KASOWITZ, BENSON, TORRES LLP,

Plaintiff,

-against-

US AMBASSADOR CESAR B. CABRERA, ret., *et al.*,

Defendants.

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DECISION AND ORDER
Index No.: 157367/2018

Motion Sequence No.: 002

O. PETER SHERWOOD, J.:

Under motion seq. no. 002, plaintiff moves to dismiss the counterclaims and for summary judgment. For the following reasons, the motion shall be granted.

I. THE COUNTERCLAIMS

A. Facts

As the first part of the motion concerns dismissal of the counterclaims pursuant to CPLR 3211, the relevant facts are taken from the counterclaim complaint (NYSCEF Doc No. 16) and are assumed to be true.

Counterclaimant Cesar Cabrera ("Cabrera") is a retired Unite States Ambassador and former resident of Puerto Rico. Cabrera is president, CEO and sole owner of counterclaim entities Barza Development Corporation ("Barza") and Zumon Corporation ("Zumon") (Cabrera, Barza and Zumon together, the "Barza parties" or "Barza defendants"). Barza and Zumon are companies primarily involved in real estate development in Puerto Rico. Between 2003 and 2011, the Barza parties acquired a 65-acre tract of land (the "Property"), made up of smaller contiguous parcels, in the municipality of Barceloneta. Having made significant investment in the property by acquiring the required permits and rezoning, the Barza parties' intent was to find a business partner or buyer to develop the tract.

In or around October 2011, Cabrera and Matthew Karp ("Karp") of Caribbean Property Group ("CPG") began discussing a potential purchase of the property by CPG or a potential joint venture with the Barza parties. To facilitate the process, CPG and Barza entered into an agreement for the exchange of confidential information "solely for the purpose of determining whether or not to proceed with the Transaction" ("CPG Agreement"). Cabrera provided all documents sought by

CPG with respect to the status of permits and rezoning, among other things. During this period, Cabrera and Karp also discussed the fair market value of the property, which had been appraised at $33 million. Karp continuously expressed interest in purchasing the Property. In January 2012, Cabrera and Karp met to discuss the details of a potential deal, but the tract was not yet zoned for commercial use. The zoning issue was the only outstanding obstacle to moving forward with a deal at that point.

In order to finance the venture, Cabrera had restructured prior debt secured by a portion of the land into a short term loan and line of credit worth approximately $1.5 million (the "Loan") with Banco Popular. The term of the Loan was originally set to expire October 31, 2011 and was later extended to October 26, 2012. When Barza sought a second extension, Banco Popular elected to forbear and continued to automatically withdraw interest from Barza'a account as it came due. Counterclaimants allege that "[d]uring this time period, however, and unbeknownst to Barza, CPG was acting behind the scenes to prevent any refinancing of the Loan by purchasing it from Barza's lender" ("the Distressed Debt Transaction"). CPG then acquired the loan so that they might call it and obtain the Property at a "fire sale" price. CPG learned about the Loan through due diligence on the Property and the related exchange of confidential information.

The Barza parties meanwhile secured all the necessary permits and zoning approvals for the Property. Another company, KRB Universal Investments ("KRB") approached Barza and began negotiating terms for purchase between October 2012 and February 2013. Karp and CPG reentered the picture in February 2013, now stating that CPG wanted to close a deal on the Property. Specifically, CPG promised that if Barza agreed to discontinue their search for a buyer and to decline any offers made in the interim, it would make a binding offer in one month. Relying on CPG's promise, Barza rejected an offer from KRB for $33.2 million on February 14, 2013. CPG did not make an offer in March 2013, or at any other time. On April 1, 2013, Banco Popular notified Barza that the Loan had been sold, and CPG notified Barza by separate letter that its affiliate would be the new servicer. On April 22, 2013, CPG refused Barza's request to extend the term of the loan and demanded immediate repayment. Barza was able to liquidate assets in order to repay the Loan in full by May 10, 2013. Despite following up regarding their agreement, Cabrera never received any further communications from Karp or CPG. Barza was not able to secure another qualified buyer.

In September 2013, Cabrera retained attorney Stephen B. Meister ("Meister") of Meister Seelig & Fein LLP ("Meister Seelig") "to represent him and his affiliates in a dispute with the Caribbean Property Group... and is affiliates relating to undeveloped acreage in Puerto Rico." Meister contacted the COO and Principal of CPG, a personal acquaintance, and confirmed that CPG had no future intention to purchase the Property but would be willing to consider paying a settlement sum. Meister expressed to Cabrera that Barza had viable claims and agreed to send CPG a demand letter detailing those claims. Meister never sent the demand letter he took no other action to pursue the claims and failed to take reasonable steps necessary to preserve the tort claims prior to expiration of the applicable statute of limitations.

In April 2015, the Barza parties began discussing its claims against CPG with attorney Jennifer Recine of Kasowitz Benson Torres LLP ("Kasowitz"). Between April 27, 2015 and June 15, 2015, Barza sent a number of documents to Kasowitz as requested in order to evaluate the claims. On June 19, 2015, Kasowitz began billing Cabrera for its work related to the CPG claims. On June 10, 2015, Barza provided Kasowitz with a page of the Meister retainer agreement that had been missing from their files and notified Kasowitz that "we do not believe that we received proper representation" from Meister. On June 22, 2015, Barza and Kasowitz signed a retainer agreement stating that Kasowitz would provide legal services "in connection with matters relating to dispute with Caribbean Property Group" and that Kasowitz would provide monthly bills. Barza paid a $10,000 retainer.

On September 14, 2015, Kasowitz sent a demand letter to CPG, which CPG rejected. Invoices show that Kasowitz did not, however, even begin to perform initial research into the limitations periods or possible tort claims against CPG under Puerto Rican law until October 20, 2015. Kasowitz itself acknowledged in correspondence to its co-counsel in Puerto Rico that it "did not become aware that it was Meister's malpractice that caused the loss of [the claim against CPG] until late October/early November 2015 when we uncovered it as part of our investigation... It was only when we began looking at the facts did we discover, in October/November, that there was a legal basis to bring a claim against Meister." Nevertheless, Kasowitz continued to tell Barza throughout 2016 that its claims would not be time-barred, and took ten months to draft a complaint against Meister. After Meister argued that the claims were time-barred, Kasowitz filed an amended complaint alleging that Kasowitz had not received Meister's billing records until November 10, 2015, and that those records were necessary to determine whether Meister did the work he was

retained to do. Kasowitz later filed a letter with the court withdrawing that portion of the amended complaint because it discovered that those statements were not true. The court ultimately dismissed the claims against Meister as time-barred.

Kasowitz also failed to provide monthly invoices in accordance with the retainer agreement. One invoice was issued on December 11, 2015 for the period of June 2015 to November 2015. Another invoice was issued on February 14, 2017 for the period of December 2015 to January 2017. Barza objected on the basis of conflicts in Kasowitz's representation of Barza. In the Meister case, Meister moved to disqualify Kasowitz as counsel because "(i) Kasowitz was a fact witness regarding the need to review the billing records to ascertain the claims against Meister and (ii) Kasowitz was conflicted because it breached its duty to inquire into claims against Meister when it was retained." Kasowitz ultimately withdrew on consent at the same time it withdrew the portion of the amended complaint about the receipt of invoices.

Counterclaimant Barza parties assert two causes of action against Kasowitz: (i) legal malpractice and (ii) breach of fiduciary duty.

B. Discussion

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

1. Collateral Estoppel as to Limitations Period

"Collateral estoppel, or issue preclusion, 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . whether or not the tribunals or causes of action are the same'" (*Parker v Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343, 349 [1999], quoting *Ryan v New York Tel. Co.*,

62 NY2d 494, 500 [1984]). "The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d at 349). Collateral estoppel will only be applied "to matters actually litigated and determined in a prior action" (*Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 456 [1985] [internal quotation marks omitted] citing Restatement [Second] of Judgements §27).

In the action against Meister for malpractice and breach of fiduciary duty, brought in the United States District Court for the Southern District of New York, "[t]he Court set a schedule for discovery limited to the issue of whether plaintiffs' claims against Meister Seelig are time-barred, and granted defendants leave to thereafter move for summary judgment" (Recine aff, exhibit D [NYSCEF Doc No. 22] at 2). On the motion for summary judgment, the court found that "the summary judgment record contains uncontradicted evidence that plaintiffs knew of their injury and its source no later than July 2014" (*id.*) and that "[t]here is no evidence that plaintiffs then pursued any investigation into the expiration of the limitations period or a potential claim against defendants. The Court therefore concludes that plaintiff's claims of legal malpractice and breach of fiduciary duty [against Meister Seelig] are time-barred" (*id.* at 16). Because under Puerto Rican law the one-year statute of limitations would have started to run once a party becomes aware of its injury and the source (*see Colon Prieto v Geigel*, 115 DPR 232, 15 PR Offic. Trans. 313, 329-30 [PR 1984]), the court concluded that the limitations period for claims against Meister would have run by the end of July 2015. The claims were dismissed as they were brought after that date, on October 4, 2016.

While the court, in its analysis of the limitations period on the claims against Meister, notes that "[m]inimal diligence and the exercise of due care would have shown that the limitations period [for claims against CGB] expired in February 2014" (*id.*), that issue was not actually litigated and determined in the Meister action. Rather, the court references the Barza defendants' allegation in their verified complaint that any claims that they would have had against CPG expired on February 14, 2014 (*id.* at 4; citing federal complaint ¶¶ 81, 86).

Therefore, collateral estoppel does not apply to the issue of when claims would have expired as against CGB.

2. Legal malpractice

An action for legal malpractice requires the plaintiff prove the attorney's negligence, which was the proximate cause of the loss sustained, and actual damages (*Reibman v Senie*, 302 AD2d 290, 290 [1st Dept 2003], *Between the Bread Rlty. Corp. v Salans Hertzfeld Heilbronn Christy & Viener*, 290 AD2d 380 [1st Dept 2002], lv denied 98 NY2d 603 [2002], *Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108, 114 [1st Dept 1991] *affd*, 80 NY2d 377 [1992]). To show proximate cause, a plaintiff must demonstrate that but for the attorney's negligence, the plaintiff would either have prevailed in the underlying matter or would not have sustained damages (*Reibman*, 302 AD2d at 290, *Senise v Mackasek*, 227 AD2d 184 [1st Dept 1996]; *Stroock Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 [1st Dept 1990]).

The malpractice shall claim should be dismissed because, in light of Barza's admission, Barza cannot allege causation. The Barza defendants alleged in both the verified complaint in the Meister action, and in the counterclaims in this action, that any claims that they would have had against CPG expired on February 14, 2014 (counterclaims ¶ 77). The Kasowitz firm was not retained until June 22, 2015 (Recine aff, exhibit E). Assuming the Retention Agreement includes claims against Miester, defendants cannot claim that Kasowitz caused them "to lose valuable remedies against Meister" because the court in the Meister action found that "plaintiffs did not exercise minimal diligence to identify their injury and its source", or in other words, it was defendants' own failure "to exercise minimum diligence" that caused their claims against CPG to expire (Recine aff, exhibit D [NYSCEF Doc No. 22] at 15-16). Collateral estoppel therefore applies to this issue. To the extent this part of the opinion constitutes an "alternative holding", it was fully litigated in the underlying federal action (see *Malloy v. Trombley*, 50 NY2d 46, 52 [1980] [issue was fully litigated despite alternative holding where there was "significant internal evidence of the thorough and careful deliberation by that court, both in its consideration of the proof introduced and of the applicable law, and the determination made, although recognized to be an alternative"]).

3. Breach of fiduciary duty

In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by the defendant's misconduct (*Pokoik v Pokoik*, 115 AD3d 428 [1st Dept 2014]). A fiduciary relationship is grounded in a higher level of trust than exists between those engaged in arms-length

transactions in the marketplace (*Oddo Asset Management v Barclays Bank PLC*, 19 NY3d 584 [2012]). A fiduciary is "held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive" (*Meinhard v Salmon*, 249 NY 458 [1928]). The fiduciary is bound to exercise the utmost good faith and undivided loyalty to the principal throughout their relationship (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 [2001]).

The determination of whether a fiduciary duty exists is "necessarily fact-specific" and looks to whether the relationship is "grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" *Oddo Asset Mgt.* 19 NY3d at 593. A fiduciary relationship may be found where a party "is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation," or "when confidence is reposed on one side and there is resulting superiority and influence on the other" (*Roni LLC v Arfa*, 18 NY3d 846, 848 [2011]). Although "a contractual relationship is not required for a fiduciary relationship, 'if [the parties] do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them'" (*Oddo Asset Mgt.*, 19 NY3d at 593, quoting *Northeast Gen. Corp.*, 82 NY2d at 162).

The breach of fiduciary duty claim must be dismissed for failure to state a claim. The Barza parties allege that Kasowitz breached its fiduciary duty "by effectuating a 'noisy' withdrawal and improperly attempt[ing] to retract allegations of the complaint they drafted in a manner intended to cast doubt on the veracity of the Barza parties" (counterclaims ¶ 109). Barza has not alleged facts constituting misconduct pursuant to the heightened pleading standard of CPLR 3016 (b), particularly in light of counsel's obligations under Rule 3.3 of the Rules of Professional Conduct (CPLR 3016 Practice Commentaries ["CPLR 3016(b) requires a somewhat heightened pleading requirement for a cause of action based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence."] [internal quotation omitted]).

II. MOTION FOR SUMMARY JUDGMENT

A. Facts

As to the motion for summary judgment, the following facts are taken from the parties' Rule 19-a statements, unless otherwise stated.

Plaintiff Kasowitz brought this action to recover unpaid legal fees in the amount of $191,754.06 for its representation of defendants in connection with the above-mentioned action against Meister Seelig, among other matters. On November 9, 2018, defendants filed an answer with counterclaims for legal malpractice and breach of fiduciary duty.

The Retention Agreement between Kasowitz and the Barza defendants states that "[t]his letter confirms the retention of Kasowitz, Benson, Torres & Friedman LLP... by you in connection with matters relating to [a] dispute with Caribbean Property Group ("CPG")" ([NYSCEF Doc No 57, ¶ 6]). The parties dispute whether the initial retainer included claims against Meister, or whether the scope of representation was later expanded upon defendants' request. A series of emails shows Kasowitz partner Jennifer Recine's attempted to collect documents from defendants, including communications and invoices from Meister. The parties dispute whether defendants intentionally withheld communications for Kasowitz prior to the filing of the first amended complaint, resulting in Kasowitz withdrawing certain portions of the pleading. On October 23, 2015, Recine wrote to defendants' agent Guillermo Morales (see Morales aff ¶ 1), but not Cabrera, "I need all your communications with Meister" (Morales aff, exhibit C). On November 2, 2015, Morales wrote, "[t]hat's all the emails you requested" (Recine aff, exhibit G). On December 10, 2015, Recine wrote to Morales again stating, "really need 100 percent of your communications with the Meister firm. I also need the bills" (Recine aff, exhibit H). On December 10, 2015, Morales provided one invoice from Meister and other communications, and on December 11, 2015, Morales wrote "I believe you have 100% of our communications" (Recine aff, exhibit I; Morales aff, exhibits E, F). While Kasowitz's position is that these representations were false because it was evident and understood that they had asked for all of defendants' collective communications with Meister, defendants contend that Morales provided everything that was in his possession, and that Kasowitz failed to obtain documents from Cabrera independently.

Kasowitz filed the complaint in the Meister action on October 4, 2016 alleging legal malpractice and breach of fiduciary duty against Meister based on his failure to timely pursue defendants' claim against CPG. On November 11, 2016, Kasowitz filed the first amended verified complaint. On December 2, 2016, Kasowitz successfully opposed Meister's request for leave to file a motion to dismiss, and discovery commenced. In January 2017, while conducting document collection in Puerto Rico, Kasowitz discovered correspondence that had not been provided, as well as evidence showing that certain paragraphs in the first amended complaint alleging that Meister

had failed to provide invoices to Barza, thereby preventing Barza from discovering Meister's malpractice, were untrue and needed to be retracted. Defendants dispute this, contending that Meister sent three invoices directly to Cabrera, but not Morales, and only one was in Morales's possession. Morales was not copied on the excluded communications. One of the emails to Meister speaks to Cabrera's retention of local counsel, stating "I have a local lawyer getting the local legal cases of acting in bad faith", but defendants now contend that this lawyer, Rafael Sola Diaz, was just a neighbor who sometimes provided notary services (*compare* Recine aff, exhibit K *with* counterstatment of material facts ¶ 23). Defendants also contend that in any event, Meister failed to provide three of its six invoices until November 10, 2015.

Kasowitz moved to withdraw by consent on January 30, 2017, and the motion was granted. On Fenruary 14, 2017, Kasowitz sent defendants what was the second and final invoice for legal services in the amount of $241,754.06 (Recine aff, exhibit O [NYSCEF Doc No 33]). Defendants state that at that time, they disputed the charges (Storch aff ¶ 4). Defendants also say that they paid $50,000 because Kasowitz would not otherwise release the case file (*id.*). On July 28, 2017, the parties entered into a tolling agreement pending completion of the Meister action (Recine aff, exhibit P [NYSCEF Doc No. 34]).

B. Discussion

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most

favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos*, 46 NY2d 223, 231 [1978]). bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

1. Breach of Contract

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]). Kasowitz has established prima facie entitlement to summary judgment on the breach of contract claim by providing the Retention Letter evidencing the contract (Recine aff, exhibit E), invoices with detailed billing evidencing plaintiff's performance and damages (Recine aff, exhibit O). It is undisputed that defendants have not paid the balance of the invoice.

Defendants attempt to raise issues of fact based on assertions of plaintiff's failure to investigate the claims against Meister, failure to obtain Cabrera's records, inaccurately advising Barza as to timeliness of the claims against Meister, overbilling, and failure to provide monthly

invoices. Defendants do not state in any detail how plaintiff overbilled for their work, so this assertion fails to raise a triable issue of fact. Kasowitz does not dispute that it did not provide monthly invoices, but is correct in its contention that this does not constitute a material breach as it does not go to the object of the contract, and in any event, defendants have not suffered damages arising from the failure to provide monthly invoices. The first three alleged breaches, however, refer to defendants' counterclaim for malpractice. As discussed above, the counterclaims shall be dismissed, and therefore defendants fail to raise a triable issue of material fact.

Summary judgment shall be granted as to the breach of contract claim.

2. 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" (*Jim-Mar Corp. v Aquatic Constr.*, 195 AD2d 868, 869 [3d Dept 1993]). The agreement can be express (*Ross v Sherman*, 57 AD3d 758, 759 [2d Dept 2008]), or "may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account" (*Am. Express Centurion Bank v Cutler*, 81 AD3d 761, 762 [2d Dept 2011]). "[R]eceipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated, thereby entitling plaintiff to summary judgment in its favor" (*Shea & Gould v Burr*, 194 AD2d 369, 370-71 [1st Dept 1993] [citation and internal quotation marks omitted]).

Here, Kasowitz makes a prima facie case for entitlement to judgment on account stated as there is no dispute that the defendants received and retained the bills for the outstanding amount, nor do defendants deny that they have made payments on their balance over the course of the representation (Recine aff ¶¶ 29, 31-32; exhibit O).

Defendants' contention that plaintiff failed to provide regular invoices, however, is enough to raise a question of fact as to whether there was an account stated (*see Roth Law Firm, PLLC v Sands*, 82 AD3d 675, 676 [1st Dept 2011]; *Berkman Bottger & Rodd, LLP v Moriarty*, 58 AD3d 539 [1st Dept 2009]). During the course of Kasowitz's representation of defendants, only one invoice was provided. The second and final invoice, which represented charges for the bulk of the work, was presented to defendants after Kasowitz had withdrawn and a dispute had arisen between the parties. Defendants also state in a supporting affidavit that they raised objections to the charges

both orally and by letter on March 15, 2017, which also shows that the $50,000 payment made was to obtain the case file and not an acceptance of the account (Storch aff, exhibit B).

Summary judgment shall be denied as to the claim for an account stated.

III. MOTION FOR SANCTIONS

Plaintiff also argues that sanctions should be imposed on the defendants pursuant to 22 NYCRR 130.1-1 for bringing frivolous counterclaims. As discussed above, defendants' claims are not completely devoid of legal merit and do not rise to the level of frivolousness required by 22 NYCRR 130.1-1 to justify sanctions.

The court has considered the parties additional arguments and finds them to be unavailing.

It is hereby,

ORDERED that the plaintiff's motion to dismiss the counterclaims is GRANTED and the motion for summary judgment is GRANTED as to the breach of contract claim only; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment against defendants U.S. Ambassador Cesar B. Cabrera, Retired, Barza Development Corporation and Zumon Corporation and in favor of plaintiff Kasowitz, Benson, Torres LLP in the amount of $191,754.06 together with interest at the statutory rate of 9% per annum from February 14, 2017 to the date of entry of judgment along with costs in an amount to be fixed by the Clerk upon presentation of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: September 13, 2019

ENTER,

O. PETER SHERWOOD J.S.C.