MILLER LAW OFFICES, PLLC

SLOW DOWN, YOU MOVE TO FAST

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"The invoices do not qualify for CPLR 3213 relief because it is necessary to consult extrinsic evidence aside from the invoices and proof of nonpayment in order for plaintiff to establish its entitlement to summary judgment on its account stated claim."

Peter R. Ginsberg Law, LLC v. J&J Sports Agency, LLC, 116 N.Y.S.3d 902, 2020 N.Y. Slip Op. 01468, 2020 WL 1016359 (1st Dept., 2020)

We are pleased to share this victory with our clients and colleagues and look forward to the opportunity to continue to share good news.

MILLER LAW OFFICES, PLLC is a general practice law firm with an emphasis in Corporate Law and Commercial Litigation in New York.

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Instant Replay - Out At First

Appellate Court Reverses and Vacates Summary Judgment

A lawyer sues for unpaid legal fees. However, instead of suing *his* client who actually hired him and for whom he performed the legal work, the lawyer files suit against a family of companies - and some of their owners and representatives - who were negotiating to buy his corporate client. And instead of filing an ordinary lawsuit, the lawyer relied on a procedure called "summary judgment in lieu of a complaint" whereby a plaintiff short circuits a traditional trial to obtain a quick judgment.

This procedure is limited to cases where the alleged debt is "an instrument for the payment of money only". In plain English, the plaintiff must sue to enforce a document that is clear and unequivocal proof that a debt is owed and there are no defenses are available. Two common examples of such an instrument are (i) a promissory note (an IOU) and (ii) a bounced check.

Here, however, the lawyer did not have a bounced check or IOU upon which to sue. Instead, he relied on the fact that he had sent copies of his open invoices to Defendants' accountant and owner. In doing so, the lawyer argued that the Defendants were liable under the legal theory known as an "Account Stated", wherein invoices that are received and retained without complaint or objection are deemed accurate. The trial Judge agreed with the lawyer and awarded him a judgment of about three quarters of a million dollars! Miller Law Offices appealed.

Since the parties were in the sports business, a sports analogy seems appropriate. Summary judgment in lieu of a complaint should only be used when the case is a "slam dunk". We argued before the Appellate Division that *these* invoices did not fall into the category of "an instrument for the payment of money only" because they were not 'addressed' to the Defendants. Simply put, an ordinary person looking at the invoices would not conclude that the Defendants were responsible; that onlooker would need other information. By way of example, you would not become liable for your neighbor's mortgage bill just because the letter carrier put it in your mailbox by mistake. But if *you* receive a statement from ***your*** lender – or **your** gardener, or **your** lawyer – and hold it without objection, your silence can indeed form an independent basis of liability. Simply stated, retaining an invoice for monies owed creates liability if the debt on the invoice is based on a valid obligation.

We argued that the trial court erred in inferring that the legal fee was valid *against Defendants* just because they received and/or (allegedly) retained another entity's invoices without complaint. The Appellate Division, First Department, agreed with our analysis. It unanimously reversed the trial court and sent the case back for a conventional trial. In doing so, the Appellate Division held that "Plaintiff [lawyer] has failed to establish, based on the invoices themselves, that defendants, as opposed to nonparty Impact Sports, are liable based on an account stated claim."

The plaintiff-lawyer was understandably unhappy when his large judgement was taken off the scoreboard. Like a baseball manager who appeals a call (sorry for yet another sports analogy), the lawyer moved for "Reargument", asking the Appellate Division to overturn itself and to reinstate his judgment. In a terse decision, the Court denied the motion (as well as our cross-motion for sanctions). This was not surprising; after all, how many times is a manager successful in getting an umpire to change his own call?

One of the lessons here is that contract law is unlike criminal law where '*y*ou have the right to remain silent' and your silence cannot be construed against you. Failing to timely object to an invoice can indeed be held against you.

Another lesson is that outcome of a case is always uncertain. Here, the trial judge and appellate court reached different conclusions even though they relied on the same evidence and legal arguments.

Yet another lesson is to heed J.R.R. Tolkien's maxim (from, *The Fellowship of the Ring*) that "[s]hort cuts make long delays." The lawyer tried a short cut and it worked. Until it didn't. Both the lawyer and our clients have spent a lot of time and money getting right back to the starting line.

But it wasn't exactly the *same* starting line, which brings us to the final lesson. Even though we were sent back to the trial court, Plaintiff-lawyer learned that his claims were not the slam dunk he originally believed them to be. This changed the landscape considerably and enabled us to settle the case on favorable terms.

Litigation is often an effective tool for settling complex disputes. Such is the nature of most commercial cases; parties jostle and scramble for position, and then settle when the situation is advantageous.