Balestriere PLLC v Banxcorp
2016 NY Slip Op 30208(U)
February 2, 2016
Supreme Court, New York County
Docket Number: 650919/10
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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BALESTRIERE PLLC,

Plaintiff,

-against- Index No. 650919/10

BANXCORP and NORBERT MEHL,

Defendants.

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MADDEN, J.:

In this action to recover attorneys' fees from a former client, plaintiff Balestriere PLCC ("the Firm") moves for summary judgment on its single cause of action for quantum meruit in the amount of $556,414, which it claims is the reasonable value of its services (motion seq. 018). Defendants oppose the motion and cross-move for summary judgment dismissing the quantum meruit claim, arguing that the Firm was terminated for cause, and that there is no basis for holding defendant Norbert Mehl ("Mehl"), who is the sole owner and principal of Banxcorp, personally liable for the amounts sought.

Defendants separately move to for an order (1) striking or dismissing the Firm's claim under CPLR 3126 and/or based on spoliation, and (2) striking the Firm's reply brief in support of its summary judgment motion and the accompanying affirmation of Jillian McNeil, affidavit of Marc Natale and exhibits dated May 19, 2015 (motion seq. 020).[1] The Firm opposes the motion.

For the reasons set forth below, the Firm's motion for summary judgment is denied, and defendants' cross motion for summary judgment is granted only to the extent of dismissing the quantum meruit claim against Mehl. Defendants' motion to strike and/or for spoliation sanctions

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[1]Motion sequence nos. 018 and 020 are consolidated for disposition.

is also denied.

The Firm was retained on a contingency basis in connection with an antitrust action pending in the District Court of New Jersey, entitled *BanxCorp v Bankrate, Inc.* ("the New Jersey action"), pursuant to an Engagement Agreement executed on July 13, 2007 (*see* aff of Jillian McNeil, exhibit Q). The Engagement Agreement, which provides for a contingency of between 10 to 25 percent, depending on the extent of representation provided,[2] is between Banxcorp and the Firm and is signed by Mehl on behalf of Banxcorp. During the three years that the Firm represented defendants, no fees were paid to the Firm for its work on the New Jersey action. On June 25, 2010, Mehl terminated the Firm with a one-sentence email, stating "on behalf of BanxCorp, this is to notify you that you have been discharged for cause" (*see* McNeil aff, exhibit B).[3]

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[2] Specifically, the agreement provided for a contingency fee of:
10% if the matter is settled prior to filing by any party of an answer, or responding to or making an initial discovery demand of any kind;
15% if the matter is settled after filing by any party of an answer, or responding to or making an initial discovery demand of any kind;
20% if we must litigate any portion of a motion to dismiss or other substantive motion of any kind;
22.5% if we must handle discovery of any kind once a motion to dismiss or other substantive motion has been litigated, or if we must litigate any appeals that take place at any point prior to trial;
25% if we have a firm trial date, set after discovery is completed, and actually begin trial preparation of any kind, or if we handle the matter at trial, or if we must litigate any appeals that take place after summary judgment or after trial before any court.

[3]Mehl asserts that he sent a follow-up email delineating the reasons for the Firm's termination and extensively quotes from the email in his affidavit and states that it is attached as Exhibit 3 to his affidavit, but no such email is attached.

The complaint contains a single cause of action for quantum meruit, and, with respect to Mehl, seeks to pierce the corporate veil on the theory that he is the alter ego of BanxCorp. Defendants originally asserted four counterclaims and 11 affirmative defenses, which were dismissed by decision and order dated October 14, 2011. In a decision and order dated November 17, 2014, this court permitted defendants to add the affirmative defense of termination for cause.

Defendants' Motion to Strike

Defendants move to strike the complaint and the Firm's reply papers submitted in response to defendants' opposition to the Firm's summary judgment motion, arguing that a "new bill" submitted by the Firm in support of their motion and with their reply papers (Exhibits I and LL, respectively) was not produced in discovery and is not authenticated.[4] Moreover, they argue that the original computation of the bill was false, if not fraudulent. Defendants also seek spoliation sanctions based on the Firm's alleged failure to place a "litigation hold" on June 25, 2010, the date the Firm was terminated, to ensure the preservation of the Firm's original LexusNexus 'Time Manager' practice management software time and billing records, including audit trials and supporting back-ups.

In opposition, the Firm argues that it fully complied with discovery and produced all responsive documents in its custody and control, and that the "new bill" is not a new piece of evidence, but rather is a subset, in a new format, of the time records provided to defendants during discovery which are attached as Exhibit SS to the summary judgment motion. The Firm

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[4]The arguments in the motion to strike were originally raised in connection with defendants' memorandum in opposition to the summary judgment motion.

further asserts that the two versions of the time records differ as it removed (i) time entries for all college and law school interns and one legal analyst (initials ASD), since it no longer seeks to recover fees for this work, (ii) certain expenses which it would normally be billed to the client, and (iii) redacted time entries for work completed while the parties were attempting to negotiate the Firm's discharge.[5] Other than these changes, the Firm contends that the contents of the time entries, which were contemporaneously recorded during the course of the Firm's representation of defendants, remain the same. As for the different format, the Firm points out that the "new bill" is organized by the name of the employee performing the work, whereas the time records produced during discovery are organized by date.

In opposition to defendants' request for spoliation sanctions, the Firm asserts that defendants point to no specific destroyed evidence, and that there was never a request for its original practice management software and billing records, including back-up data. As for the request to strike the reply papers, the Firm argues that the time records submitted with the reply papers were identical to those submitted with its motion, except that a certification was included.

In reply, defendants argue that the complaint must be stricken as the Firm, through its counsel, acknowledged that the Firm did not produce time records requested in discovery, broken down by cause of action, pleading, motion and memorandum of law and correspondence. They also point to the affidavit of the Firm's chief of staff, Marc Natale (Exhibit GG to McNeil aff.) that the Firm's employees are required to input their time into the Firm's electronic case management software, including in matters billed on a contingency fee basis, and that monthly

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[5]The Firm also corrected one mechanical error in which the staff member's initials were previously omitted from a time entry.

invoices are created from this information. Defendants further assert that the Firm's failure to produce a witness who recalled producing the bill relied on by plaintiff, or the manner and methods of producing the bill, demonstrates that there is no proper foundation for such bill.

In its sur-reply, and as stated by its attorney on the record during oral argument of the motion, the Firm asserts that as it was hired by Banxcorp on a contingency basis, the Firm did not create or submit monthly invoices during the course of its representation of Banxcorp, and that the time records produced were not bills or invoices but the best reproduction of electronically stored information regarding the Firm's time entries, which entries are made by individual staff members assigned to a client's matter, and are separated out by action. In each entry, the staff member records the work done and the time spent.

"The drastic sanction of striking pleadings is justified only when the moving party shows conclusively that the failure to disclose was wilful, contumacious or in bad faith" (*Roman v. City of New York,* 38 AD3d 442 [1st Dept 2007][citation omitted]); *see also, Marks v. Vigo*, 303 AD2d 306 [1st Dept 2003][noting that "[i]n view of the strong preference in our law that actions be decided on their merits... a court should not resort to the drastic remedy of striking a pleading for failure to comply with discovery directives unless the noncompliance is established to be both deliberate and contumacious"]).

Here, defendants have not demonstrated any conduct of the kind that would warrant striking the Firm's complaint or its reply papers submitted in connection with its summary judgment motion. To the contrary, the record shows that the Firm did not engage in any misconduct and is in compliance with its discovery obligations. Specifically, while the time records submitted with the summary judgment motion were previously produced in a different

format and removed certain entries enumerated above, including for interns for which the Firm no longer seeks fees, such changes do not provide a basis for awarding discovery sanctions. Nor is there a basis for granting spoliation sanctions based on the Firm's alleged failure to produce audit trials and supporting back-ups for software time and billing records, which documentation was never sought by defendants during discovery. In addition, contrary to defendants' position, the Firm was not required to create time records in a format not maintained by the firm (*see Rosado v. Mercedes-Benz of North America, Inc.*, 103 AD2d 395, 398 [2d Dept 1984]), and Natale's descriptions of "monthly invoices" from the data entered by its employees into the software system is not inconsistent with the Firm's description of its recording keeping practices.

Defendants' argument that the quantum meruit claim should be dismissed on the ground that plaintiff has not provided any evidentiary proof in admissible form in support of its time sheets, hourly fees and bills, as the Firm has failed to submit an original bill or time sheets, and has relied on unauthenticated electronic business records in violation of CPLR 4518, the "Business Record Rule," is similarly unavailing.

CPLR 4518(a) provides that:

> Any writing or record whether in the form of an entry to a book or otherwise, made as a memorandum or record fo any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence, or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence, or event, or within a reasonable time thereafter. An electronic record, as defined in section three hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by

> the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.

(CPLR 4518 [a][6]).

The foundation requirements of CPLR 4518(a), which apply to electronic records, are "first, that the record be made in the regular course of business—essentially, that it reflect a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business; second, that it be the regular course of such business to make the record (a double requirement of regularity)—essentially that the record be made pursuant to established procedures for the routine, habitual, systematic making of such a record; and third, that the record be made at or about the time of the event being recorded—essentially, that recollection be fairly accurate and the habit or routine of making the entries" (*People v. Kennedy*, 68 NY2d 569, 579-580 [1986]; *see also*, *JDL Imports co., Inc. v Hartstein*, 79 AD3d 539 [1st Dept 2010][computer generated print-out was properly admitted as a business record]).

Here, it cannot be said that the Firm has not met the foundation requirements for admission of the time records generated by the Firm's practice management software as a business records under CPLR 4518(a). Specifically, in his affidavit dated March 15, 2015 (Exhibit GG to McNeil aff.), Mr. Natale states that he is responsible for establishing billing and

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[6] Defendants also argue that the time records do not comply with CPLR 4539(b), which addresses the reproduction of documents in a form different than the form originally recorded. CPLR 4539(a) creates an exception to the best evidence rule for copies of documents made by an original reproduction process, while 4539(b) extends this coverage to the reproduction of computer stored images (Alexander, *McKinney's Practice Commentaries*, CPLR 4501-5000, CPLR 4539 at 751-753 [2007]). As the computer generated time records at issue in this case do not consist of computer-stored images, this provision is inapplicable.

time-entry procedures, as well as submitting invoices for services rendered and maintaining records related to billing the firm clients (Natale aff. ¶ 2). In his May 19, 2015 affidavit, Mr. Natale (Exhibit TT to Second McNeil aff.), states that the time records constitute business records made and kept in the regular course of the Firm's business; that the Firm's records are made at or about the time the event is recorded; and that the Firm's time records are made by the individual acting within the course of its business. In addition, in her further affirmation submitted in connection with the Firm's summary judgment, the Firm's counsel, Jillian L. McNeil, states that the time records were made contemporaneously with the actions described therein by entering time into the Firm's practice management software (McNeil aff, ¶ 5) Furthermore, each individual time entry on its own shows the date and the author (*see* time records[7] [2d McNeil aff., exhibit LL]).

Finally, contrary to defendants' position, that Natale testified at his deposition that he did not recall or recognize the time record produced by the Firm in discovery does not render the record, or its updated version, inadmissible but, rather, goes to the weight accorded to the document [8] (*See Halycon Ins. Co v. Fox,* 44 AD3d 662 [2d Dept 2007][holding that an assistant vice president who handled claims on behalf an insurance "was competent to testify regarding how his company stored and retrieved electronic records, and the fact that he did not personally print the replica of the notice of cancellation which was sent to the insured went to the weight to

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[7]Contrary to defendants' argument, these statements are sufficient to demonstrate "when, how or by whom" the time records were made.

[8]As pointed out by the Firm, in its decision and order dated June 6, 2014, the court denied defendants' motion to strike on the ground that Natale's deposition testimony regarding time records did not satisfy the Firm's discovery obligations.

be accorded to the replica, not its admissibility"]; Barker and Alexander,5A *NY Prac. Evidence in New York and State Courts* § 8:41 [Nov. 2015]["To establish the three foundation requirements, it is not necessary to call the person who actually made the record. It is enough that an employee familiar with the office routine can testify that such records are routinely and contemporaneously made in the course of business and that it is regular business practice to make such records"]; CPLR 4518[a]).

Accordingly, defendants' argument that the complaint should be dismissed as the time records relied on by the Firm are inadmissible is without merit (*see Xanboo v. Ring*, 40 AD3d 1081 [2d Dept 2007][holding that records, which identified the attorneys who worked on the case, the tasks that they performed, and the time spent on each task, were created contemporaneously with the services performed, and were properly admitted into evidence pursuant to the business records exception to the hearsay rule]; *Foster v. Kings Park Cent. Sch. Dist.*, 174 FRD. 19, 28 [EDNY 1997]["it is not necessary for the [attorney] to submit the actual diary entries made . . . at the time she performs the work. Rather, reconstruction of such contemporaneous records on a computer and billing based on these records is adequate"]; *Finkelstein Newman Ferrara LLP f/k/a Finkelstein, Newman LLP*, 36 Misc3d 144[A][App Term 1st Dept 2012][Plaintiff's managing partner's testimony was sufficient to lay a foundation for the admission of the billing records pursuant to the business records exception to the hearsay rule]; *Jordan v. Freeman*, 40 AD2d 656 [1st Dept 1972][awarding attorneys' fees on quantum meruit basis despite attorney's failure to keep a diary or time records]).

Summary Judgment Motions

"'The proponent of a summary judgment motion must make a prima facie showing of

entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982, 985 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and "should not be granted where there is any doubt as to the existence of a triable issue" of fact (*American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]).

Quantum Meruit Claim

A client has "an absolute right, at any time, with or without cause, to terminate the attorney-client relationship by discharging the attorney" (*Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38, 43 [1990]; *see Doviak v Finkelstein & Partners, LLP*, 90 AD3d 696, 698 [2d Dept 2011]; *Coccia v Liotti*, 70 AD3d 747, 757 [2d Dept], *lv dismissed* 15 NY3d 767 [2010]). "Where that discharge is without cause, the attorney is limited to recovering in quantum meruit the reasonable value of the services rendered" (*Campagnola,* 76 NY2d at 44; *Teichner v W & J*

Holsteins, 64 NY2d 977, 979 [1985]; *see Matter of Cooperman*, 83 NY2d 465, 473 [1994] ["[i]f a client . . . discharge[s] an attorney after some services are performed but prior to the completion of the services for which the fee was agreed upon, the discharged attorney is entitled to recover compensation from the client measured by the fair and reasonable value of the completed services"]).

In contrast, "[a]n attorney who is discharged for cause . . . is not entitled to compensation or a lien" (*Callaghan v Callaghan*, 48 AD3d 500, 501 [2d Dept 2008]; *see also Campagnola,* 76 NY2d at 44). "Although the New York courts have not explicitly defined 'cause' the case law reflects that it means that the attorney has engaged in some kind of misconduct, has been unreasonably lax in pursuing the client's case, or has otherwise improperly handled the case" (*Garcia v Teitler*, 2004 WL 1636982, *5 [ED NY 2004], *affd* 443 F3d 202 [2d Cir 2006]; *see also Rotker v Rotker*, 195 Misc 2d 768, 770 [Sup Ct, Westchester County 2003] [describing "cause" as "attorney misconduct or the unjustifiable abandonment of the representation"]).

At the same time, "[w]here an attorney is discharged not because he or she neglected to properly represent the client but because of 'personality conflict, misunderstandings or differences of opinion having nothing to do with any impropriety by . . . the lawyer,' the discharge is not 'for cause' and the attorney does not forfeit his or her fee" (*Gurry v Glaxo Welcome, Inc.*, 2000 WL 1702028, *2 [SD NY 2000], quoting *Klein v Eubank*, 87 NY2d 459, 463 [1996]; *see also see also Callaghan*, 48 AD3d at 501 [a client's "dissatisfaction with reasonable strategic choices regarding litigation" does not "as a matter of law, constitute cause for the discharge of an attorney"]). Moreover, "forfeiture of the fee occurs only where 'the misconduct relates to the representation for which the fees are sought'" (*Wingate, Russotti &*

Shapiro, LLP v. Friedman, Khafif & Associates, 41 AD3d 367, 370 [1st Dept 2007] quoting *Decolator, Cohen & DiPrisco v. Lysaght, Lysaght & Kramer, P.C.*, 304 A.D.2d 86, 91, [2003]). In general, the issue of whether an attorney was terminated for cause is a factual one that must be resolved at a hearing or at trial (*Teichner,* 64 NY2d at 979; *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 12-13 [1st Dept 2008]).

On a motion for summary judgment on a quantum meruit claim, the plaintiffs "'must establish (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services'" (*Caribbean Direct, Inc. v Dubset, LLC*, 100 AD3d 510, 511 [1st Dept 2012] [citation omitted]); *see also Miranco Contr. Inc. v Perel*, 57 AD3d 956, 957 [2d Dept 2008]). A plaintiff asserting a valid quantum meruit claim "'recovers the reasonable value of his performance whether or not the defendant in any economic sense benefitted from the performance'" (*Brennan Beer Gorman/Architects, LLP v Cappelli Enters., Inc.*, 85 AD3d 482, 484 [1st Dept 2011] [citation omitted]).

In support its motion for summary judgment, the Firm contends that it was terminated without cause, and is entitled to recover against defendants in quantum meruit. The Firm asserts that between July 13, 2007 and June 25, 2010, the Firm provided services for defendants at defendants' request, an element necessary for recovery in quantum meruit (*see e.g. Fulbright & Jaworski, LLP v Carucci*, 63 AD3d 487, 489 [1st Dept 2009]). Specifically, the Firm contends it committed significant resources to the prosecution of the New Jersey action on behalf of BanxCorp, and upon Mehl's direction, which consisted of approximately 1400 hours of work, including over 50 documents filed with the Court; five conferences with the Court; preparation

and service of numerous discovery documents and correspondence; research and preparation of memoranda recording that research; at least 112 calls or meetings with defendants or adversaries; and over 3,000 emails exchanged by Firm staff with defendants, adversaries, co-counsel and others. The Firm further contends that defendants communicated frequently with the Firm throughout the representation, and accepted the Firm's services.

According to the Firm, its expectation of compensation was clear, and is confirmed by repeated negotiations concerning invoices, billing, and rates (*see* emails regarding engagement [McNeill aff, exhibits M-P]). The Firm contends that it is entitled to at least $556,414 for the services it provided defendants. In support of this contention, the Firm submits its contemporaneously recorded billing statement (*see* McNeil aff, exhibit I, *see also* exhibit LL). In addition, the Firm argues that the court should take into consideration that based on the work it performed in the New Jersey action, under the Engagement Agreement, it would have been entitled to 22.5% of any recovery in that action (*see e.g. Klein v Eubank*, 87 NY2d at 357 [noting that in calculating the value of the services rendered prior to termination of the attorney-client relationship, the terms of the original retainer [are] a relevant consideration"]) .

Defendants oppose the motion and argue that their cross motion for summary judgment dismissing the quantum meruit claim should be granted, asserting that the Firm has no right to recover a fee as it was justifiably discharged for cause. Specifically, defendants contend that the Firm's conduct fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession, and it failed to provide "superior legal representation" to BanxCorp in the New Jersey action, as required pursuant to the engagement letter. Defendants assert that, upon the Firm's engagement, John Balestriere immediately vanished from the scene

and delegated the New Jersey action to Craig Lanza ("Lanza"),[9] whom the Firm later fired (Mehl aff, ¶ 26). Defendants further assert that the Firm kept frequently replacing its counsel of record with new counsel of record, who never had any direct contact with BanxCorp throughout the course of the Firm's representation, without any explanation or justification, and without BanxCorp's prior consultation or approval (*id.*, ¶¶ 27-28).

Moreover, according to defendants, the Firm made repeated and inexcusable pleading and procedural errors in the New Jersey action, and ignored the New Jersey court's orders and instructions, filing a fruitless motion to compel discovery, despite the Magistrate's warning, causing the court frustration and dissatisfaction with plaintiff. Defendants assert that this alleged incompetence caused significant delays and harm to BanxCorp (*id.*, ¶ 32). As an example, they cite to the following excerpt from the September 14, 2009 opinion of the Hon. Susan D. Wigenton:

> "Although it is questionable whether justice truly "requires" that BanxCorp be granted leave to amend the complaint a fourth time, this Court is inclined to grant one– and only one–more opportunity to correct the pleading deficiencies addressed in this Opinion. Leave is not granted to amend portions of the complaint not addressed in this Opinion. Nor may BanxCorp add additional causes of action or new theories of liability"

(*BanxCorp. v Bankrate, Inc.*, 07-cv-03398 [D NJ 9/14/ 2009], Docket no 75, at 8).

Defendants also contend that the firm relied excessively on unlicensed apprentices, and that by 2009, the Firm had become notorious for its aggressive reliance on college apprentices rather than on experienced licensed attorneys (*id.*, ¶ 30). According to defendants, by September of 2009, the Firm's representation of BanxCorp was steadily deteriorating. Balestriere

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[9]While in this part of his affidavit, Mehl describes Lanza as an associate, he was a partner at the Firm.

terminated his relationship with his former partner, Lanza, the lead counsel who was handling the New Jersey action, and essentially turned the case over to Laura Sayler, a newly hired inexperienced paralegal apprentice and recent college graduate with no legal background whatsoever (*id.*, ¶ 34). In support their position, defendants submit, *inter alia*, a document produced by the Firm indicating that Sayler, who is identified with the initials LCS, as an analyst who spent 342.8 hours on the BanxCorp matter, representing more than 20% of the total hours billed, and more than any other individual at the firm (*id.*, ¶ 35; *see* exhibit 9). Defendants contend that plaintiff recklessly entrusted the handling of highly sensitive pleadings, legal briefs, and discovery matters in the New Jersey action, including the delegation of a highly sensitive "meet and confer," telephone conference on December 1, 2009 with respect to the parties respective motions to compel discovery,[10] negotiations and correspondence with BanxCorp's opposing counsel to the inexperienced Sayler[11] (*id.*, ¶¶ 36-38). Defendants point out that Sayler's role in the December 1, 2009 call and the letters that followed is set forth in a Declaration dated December 4, 2009, filed in the District Court by opposing counsel Bankrate's attorney, Michael Hahn.[12]

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[10]Mehl describes this conference as "a lengthy and intricate 'Meet and Confer' telephone conference conducted by Ms. Sayler, who was unsupervised by any attorney at the firm and opposing counsel Michael Hahn of Lowenstein Sandler PC—one of the largest law firms of the state of New Jersey—pertaining to a motion to compel discovery in the New Jersey action." (Mehl aff,¶¶ 36-38)

[11]Defendants submit an extensive email exchange between Mehl and Balestriere during the period between December 4 and 10 (Mehl aff., Exhibit 10) in which Mehl questions that propriety of Sayler's participation in the meet and confer conference call, and in writing letters as follow up to the call, as reflected in an affirmation of Hahn submitted to the District Court.

[12]Specifically, the Declaration states, in relevant part that "pursuant to this Court's orders dated November 13 and 18...I participated in a second meet and confer on December 1, 2009 via

With respect to Balestriere's behavior towards him, Mehl contends that Balestriere sent threatening emails to him and his wife and yelled at him on the phone on several occasions, urging him to hire other counsel to represent BanxCorp, and abruptly kept hanging up the phone (Mehl aff, ¶¶ 41 -43, *see* exh, 13,15).[13] Mehl further contends that on December 27, 2009, Balestriere shouted at him and insulted him by leaving a threatening voice mail recording on his cell phone (*id.*, ¶ 32, *see* exhibit 14), and, a few hours later, sent three threatening and frightening emails to both Mehl and his wife Batsheva, insisting that he wanted to show up at their door to address their concerns, which they purportedly found to be alarming (*id.*, ¶¶ 41-44).

The Firm sharply contests defendants' contention that the Firm was discharged for cause. The Firm asserts that defendants do not present any evidence that shows that the Firm's representation fell below the ordinary skill and reasonable care of the profession, and that none of the purported conduct asserted by defendants amounts to the type of egregious misconduct encompassed by the "just cause termination" affirmative defense.

Specifically, the Firm contends that, contrary to defendants' arguments, Balestriere, in

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telephone with Laura Sayler, a paralegal with [the Firm], in a good faith effort to resolve the issue raised by the parties' respective motions to compel without the intervention of the Court. On December 2, 2009, I received a letter from Laura Sayler which memorialized that BankCorp had agreed, notwithstanding its prior objections to provide responses to Interrogatory Nos. 1, 2, 5, 6, 7, and 9 and Document Request Nos. 13, 19, 21, 46, 47, 49, 50, and 54...On December 3, 2009, just one day before Bankrate's letter brief in support of the motion to compel was filed with the Court, I received a letter from Laura Sayler wherein she amended her December 3, 2009 letter and withdrew her agreement to further respond to Bankrate's Interrogatory Nos. 1, 2, 5, 6, 7" (Mehl aff., Exhibit 10).

[13]While this section of Mehl's affidavit refers to emails dated December 27, 2009, April 30, 2010 and June 22, 2010, with respect to these dates the only emails submitted by defendants are printouts of the December 27, 2009 emails.

collaboration with senior partner Lanza, was at all times closely involved in the Firm's representation of defendants, and at no time did defendants' action progress without the direct involvement and supervision of at least one, if not both, of these two senior partners. According to the Firm, there is no evidence that Lanza "essentially abandoned the [New Jersey action] and BanxCorp's representation by September 2009," as alleged by Mehl, and note that the time records show that Lanza continue to work on the New Jersey action in September 2009. Moreover, the Firm contends that its delegation of work to legal analysts (which is the term the Firm uses to refer to non-attorney paralegals) was under the direct supervision of attorney supervisors, and thus, is not improper. The Firm also maintains that defendants' allegations that the Firm "turned over the case to Laura Sayler, a newly hired inexperienced paralegal apprentice" in September 2009 is false, as Balestriere or another attorney closely supervised Sayler on every task she performed, and that no document or letter was submitted by Sayler in the New Jersey action without Balestriere or another attorney's close review.

With respect to Sayler's role in the December 1, 2009 meet and confer telephone call, the Firm maintains that there was nothing inappropriate about Sayler handling the call, which followed an in-person meet and confer attended by Balestriere, who was accompanied by Sayler, in which it was clear that the defendant Bankrate did not intend to turn over documents in the early phases of discovery, and that the telephone call was a follow-up call in which Balestriere instructed Sayler to ask certain follow up questions. The Firm argues that Sayler's role "was completely proper under the relevant rules and guidelines," and, in support of its position, points out that the Declaration filed by Mr. Hahn in the District Court of New Jersey explicitly referred to Sayler's role and that "the District Court did not issue any orders or admonishments finding

the December 1, 2009 call problematic in any way." The Firm further argues that even if Sayler's role in the call was improper, defendants have shown no damages resulting from the call, particularly as the Firm had previously met its meet and confer obligations.

The Firm next points out that defendants continued to work with the Firm for more than six months after the purported reasons for their termination occurred, which, they argue, shows that the for cause justification is an attempt to avoid liability for three years of work. In addition, with respect to its alleged pleadings and procedural errors, the Firm points out that a motion to dismiss the third amended complaint was denied by the District Court. and that defendants' subsequent counsel in the New Jersey action have submitted four additional amended pleadings. The Firm also disputes Mehl's interpretation of the emails sent by Balestriere to Mehl and his wife, contending that these emails amount to nothing more than personality conflicts, which is not enough to demonstrate termination for cause.

Here, as each side presents sharply conflicting claims as to whether the Firm was discharged for justifiable cause, the issue must be resolved at trial (*see e.g. Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 12-13 [1st Dept 2008] *see also Matter of Mason v City of New York*, 67 AD3d 475, 475 [1st Dept 2009] ["[a] hearing is required to determined if respondent [attorney] was discharged for cause, and, if not, the amount of his fee on a quantum meruit basis"]; *Schultz v Hughes*, 109 AD3d 895, 897 [2d Dept 2013]["'Where there are conflicting claims as to whether an outgoing attorney was discharged with or without cause, an evidentiary hearing is necessary to resolve such dispute'"]). This conclusion is consistent with a review of the emails which reveals that while, on their face, they do not appear to be threatening, it is entirely possible that Mehl and his wife, in conjunction with contentious phone calls they had

with Balestriere, subjectively viewed them as both hostile and alarming.[14] Thus, an issue of fact is raised as to whether they legitimately viewed them as a threat. Furthermore, with respect to Sayler's role in the New Jersey action, it cannot be said, based on the record before the court, as a matter of law, that such role provides a basis for terminating Firm for cause as there are factual questions as to the nature and extent of Sayler's role and the Firm's supervision of her, and whether her role violated any ethical or other rules and/or caused harm to defendants.

In addition, in the event it is found that the termination was without cause, the amount of the award should be determined by the fact finder based upon evidence of the time and skill required in that case, the complexity of the matter, the attorney's experience, ability, and reputation, the client's benefit from the services, and the fee usually charged by other attorneys for similar services (*see Matter of* Freeman, 34 NY2d 1, 9 (1974); *Teichner,* 64 NY2d at 979). As for defendants' argument that the quantum meruit computation is unreasonably excessive, it raises a factual question for trial. Moreover defendants' argument that the Firm's damages "are exceeded by, and must be offset against, the damages, costs and expenses sustained by defendants in conjunction with the ongoing [New Jersey action]," is unavailing as defendants failed to raise set off as an affirmative defense in their answer and, insofar as defendants seek affirmative relief, the court notes that counterclaims were dismissed in this court's October 14, 2011 decision and

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[14]The emails and voice mail transcript indicate a disagreement between Balestriere and Mehl which appears to have begun after Mehl questioned a citation used by the Firm in a brief, and Mehl's accusation that the citation was the result of Sayler's assistance. The communications further reflect that Mehl and/or his wife were critical of the Firm's representation and Balestiere's judgment and ethics. Balestriere responded to this criticism with harsh words in a voice mail to Mehl which chastised Mehl for making complaints through his wife. There is also an email from Balestriere requesting that Mehl retain a different law firm since Mehl's wife did not trust him.

order.

Accordingly, the Firm's motion for summary judgment is denied, as is defendants' cross motion seeking summary judgment on the ground that the Firm was terminated for cause.

Piercing the Corporate Veil

The Firm argues that Mehl is the alter ego of BanxCorp and therefore benefitted in his individual capacity from the services provided by the Firm, warranting judgment against both of them on the quantum meruit claim.

Specifically, the Firm contends that BanxCorp does not observe any corporate formalities, that BanxCorp is undercapitalized and existed throughout the Firm's representation solely for the purposes of conducting the New Jersey action, that Mehl makes all decisions for BanxCorp on his own, that BanxCorp operates entirely out of Mehl's home and has no employees, and that Mehl pays and guarantees the debts of BanxCorp. In support of these contentions, the Firm cites to Mehl's deposition testimony that beginning in 2008 or 2009, as a result of a loss of revenues arising from the alleged antitrust violations of its competitor Banxrate, that are the subject of the New Jersey action, Banxcorp was forced to downsize its operations. The downsizing included closing its commercial offices, so that it eventually operated exclusively out of his personal residence, and laying off all of its employees other than Mehl and his wife, who became BanxCorp only employees and Board members (Mehl Dep, 23-24, 26, 28). The Firm also points to Mehl's testimony that emails sent to Banxcorp's four addresses all go to him (Mehl Dep 15-16), that since 2003 or 2004, he put more money into Banxcorp personally then he withdrew; that he has not taken a salary since 2005; and that by 2013, the annual cost of to run Banxcorp was $25,000 (Id at 134-136).

In opposition, Mehl submits an affidavit in which he maintains that BanxCorp did, in fact, observe corporate formalities. Defendants attache two prior declarations that Mehl made on April 12, 2011 and April 24, 2011 in the New Jersey action, pursuant to an order of Magistrate Judge Madeline C. Arleo (*see* Mehl aff, exhibits 31 and 32), in which Mehl attests to BanxCorp's document retention policies and procedures (BanxCorp's DRP and supplemental DRP). BanxCorp's DRP provides that BanxCorp's document retention policies and procedures, are "fully compliant with Internal Revenue Service recordkeeping requirements and federal and state business record retention requirements" (BanxCorp's DRP, ¶ 4). BanxCorp's DRP identified approximately 34 employees with names, dates, titles and dates of employment from 2001 to 2011, who had a banxcorp.com email, other than Norbert Mehl and his wife (*id.*, ¶ 16).

Mehl also avers that BanxCorp was eventually required to downsize its operations due to its competitor, and thus as of December 31, 2010, was no longer a viable concern (*id, ¶ 108).* He also states that the company "became undercapitalized at the peak of the financial crisis in 2009...and [BanxCorp] had to relocate to its office to [the home office] during the 4th quarter of 2009...twenty-five years after being established in 1984 [and] ... more than two years after retaining the Firm in 2007 [and] only a few months before terminating the Firm..." (*id,* ¶ 109). He also notes that the Third Amended Complaint filed on Banxcorp's behalf in the New Jersey action contained allegations as to the substantial harm caused to BanxCorp, doing business as BanxQuote, by Bankrate's antitrust violations, including that "unless BanxQuote's owner Norbert Mehl continues to finance its unprofitable operations through his personal funds" (*id,* ¶ 108).

Mehl also states that during the relevant periods, i.e. before 2009, BanxCorp did not operate out of Mehl's home, but maintained a commercial office at various business locations (*id.*,

¶¶ 111-117). Mehl also states that BanxCorp held numerous board meetings, with board members Norbert and Batsheva Mehl, and Raul G. de Asis. Mehl also submits BanxCorp's SEC Prospectus, which contains a detailed description of BanxCorp's corporate structure, identifying BanxCorp's directors, executive officers and significant employees, including Norbert Mehl, Diana (aka Batsheva) Mehl, and Raul G. de Asis (directors), Roy P. Adams, (vice president of information services) and Abu A. Thomas (chief technology officer) (*id.*, ¶ 117; *see* exhibit 1). Finally, Mehl avers that, while he acted as BanxCorp's CEO and spokesperson, he made no decisions on behalf of BanxCorp independently of Batsheva Mehl (Mehl aff, ¶¶ 125-127), and thus did not have total control of BanxCorp.

In reply, the Firm argues that Mehl's statements in his affidavit contradict his deposition testimony and should not be considered; the DRP relied on by Mehl is insufficient to demonstrate that the firm obeyed corporate formalities, and the SEC Prospectus created in 2001 is irrelevant to the issue of whether Mehl was the alter ego of BanxCorp from 2007 to 2010.

Piercing the corporate veil through an alter-ego theory of liability requires a showing that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]; *see also Billy v Consolidated. Mach. Tool Corp.*, 51 NY2d 152, 163 [1980] ["the courts will disregard the separate legal personality of the corporation and assign liability to its owners where necessary to 'prevent fraud or to achieve equity'"]; *Fisher v Zaks*, 48 AD3d 251 [1st Dept 2008]). When evaluating whether an individual or parent company dominates the affairs of a company for the purposes of piercing the corporate veil, the court may consider the

following factors: (1) the absence of corporate formalities; (2) inadequate capitalization; (3) whether funds are put in and taken out the corporation for personal rather than corporate purposes; (4) the amount of business discretion displayed by the dominated corporation; (5) common office space, address, and telephone numbers; (6) the payment or guarantee of debts of the dominated corporation by the dominating party; and (7) whether the corporation in question had property that the dominating party used as if it were its own (*Wm. Passalacqua Bldrs., Inc. v Resnick Devs., S.*, 933 F2d 131, 139 [2d Cir 1991]).

"The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" *(Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d at 142). "An inference of abuse does not arise . . . where a corporation was formed for legal purposes or is engaged in legitimate business" (*Credit Suisse First Boston v Utrecht-America Fin. Co.*, 80 AD3d 485, 488 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also, James v Loran Realty Corp.*, 20 NY3d 918, 919 [2012]).

Here, the Firm has not met this burden, as it has failed to produce any evidence that Mehl took steps to render the BanxCorp insolvent in order to avoid paying the Firm's legal fees or to avoid its claim for damages, or to otherwise defraud the Firm. In other words, the Firm fails to show that Mehl's actions were specifically designed for the purposes of leaving BanxCorp judgment proof so as to avoid paying the Firm's fee. To the contrary, the record shows that the downsizing of BanxCorp, including its laying of its employees, its closing of its commercial offices, and its loss of revenue and undercapitalization were the result of the business losses

caused by the alleged antitrust violation of a competitor which is the subject of the New Jersey action. Furthermore, the Firm fails to show that BanxCorp was not formed for legal purposes, or was not engaged in legitimate business. Finally, contrary to the Firm's argument, Mehl's statements in his affidavit, when read in the context of his statements regarding the downsizing of BanxCorp, do not directly conflict with his deposition testimony

Accordingly, as the Firm has not met its burden of demonstrating the merit of its alter ego theory, the quantum meruit claim against Mehl, which is based solely upon this theory, must be dismissed.

In view of the above, it is

ORDERED that the Firm's motion for summary judgment is denied; and it is further

ORDERED that defendants' cross motion is granted to the limited extent that the remaining cause of action for quantum meruit is dismissed as against defendant Norbert Mehl, and is in all other respects denied; and it is further

ORDERED that defendants' motion to strike and/or for spoliation sanctions is denied.

Dated: February 2, 2016

ENTER:

HON. JOAN A. MADDEN
J.S.C.