STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

McNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.,

Plaintiff,

- against -

LEWIS FAMILY FARM, INC., BARBARA LEWIS and SALIM B. LEWIS,

Defendants.

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR CHANGE OF VENUE
AND
REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Index No. 2184-12

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Plaintiff, McNamee, Lochner, Titus & Williams, P.C., ("McNamee Lochner") submits this Memorandum of Law (i) in opposition to the cross-motion of defendants, Lewis Family Farm, Inc. ("Lewis Farm"), and Barbara and Salim ("Sandy") Lewis for change of venue, and (ii) in reply to the opposition of these same defendants to its motion for summary judgment, on its first cause of action, for an account stated for unpaid legal fees and disbursements in the amount of Two Hundred Ninety-Eight Thousand One Hundred Forty-One and 56/100 ($298,141.56) Dollars, with prejudgment interest.

STATEMENT OF UNDISPUTED AND ADMITTED MATERIAL FACTS

Despite defendants, Lewis Farm and Barbara and Sandy Lewis's attempt to confuse and distract with immaterial and irrelevant facts, the relevant and material facts are not in dispute. Plaintiff, McNamee Lochner seeks to recover unpaid legal fees on an account stated. Defendants, Lewis Farm and Barbara and Sandy Lewis admit that on September 7, 2007, plaintiff McNamee Lochner was retained to represent defendant, Lewis Farm in two separate, but related proceedings involving the Adirondack Park Agency ("APA"), an administrative enforcement proceeding (the "Enforcement Proceeding") and an appeal from an August 29, 2007, Decision and Order of the Supreme Court, Essex County, arising from a declaratory judgment action (the "Appellate Proceeding"). Defendants, Lewis Farm and Barbara and Sandy Lewis further admit McNamee Lochner was thereafter retained to represent individual defendants, Barbara Lewis and Sandy Lewis and defendant, Lewis Farm in two Article 78 proceedings that arose from the Enforcement Proceeding, one commenced by defendant, Lewis Farm seeking judicial review of the Enforcement Proceeding ("Action No. 3"), the other commenced by the APA seeking to enforce the determination in the Enforcement Proceeding ("Action No. 4").

Notably, the parties do not dispute that McNamee Lochner, beginning on or about December 31, 2007, and continuing through to on or about June 30, 2011, prepared and sent to defendant, Lewis Farm and defendants, Barbara and Sandy Lewis detailed, periodic invoices for services rendered, calculated upon the applicable hourly rate of the shareholders and associates of the law firm, and disbursements advanced, which defendants, Lewis Farm and Barbara and Sandy Lewis admit having received. Nor do the defendants allege or is there any dispute that neither defendant, Barbara Lewis nor defendant, Sandy Lewis, during the course of McNamee Lochner's representation of them, and of Lewis Farm, ever questioned or complained in writing to any partner, associate or employee of the law firm about any invoice or any specific charge in any invoice, and the defendants have failed to present evidence that they orally objected to any invoice or any specific charge in any invoice. At most, defendant, Sandy Lewis alleges he told plaintiff he would address the issue of the firm's invoices when the matters were concluded, which in any event he does not allege he did and, in fact, did not do.

There is no question that, by affidavit, sworn to August 13, 2009, defendant, Lewis Farm, seeking its fees and expenses, under the New York State Equal Access to Justice Act ("EAJA"), from the APA testified that, "as of August 10, 2009, the Lewis Family Farm ha[d] incurred fees and [wa]s obliged to pay $287,292.69 to McNamee, Lochner, Titus & Williams, P.C. for its services", and that by affidavit, sworn to March 3, 2010, defendant, Sandy Lewis further testified that he had not, "experienced dishonesty, incompetence or misconduct in John J. Privitera, Esq., or Jacob F. Lamme, Esq., counsel to Lewis Family Farm", and that it was his assessment that "counsel's performance ... [wa]s good." Moreover, defendant, Lewis Farm and defendants, Barbara and Sandy Lewis, admit that pursuant to their agreement with plaintiff, McNamee

Lochner, the defendants, made partial payments, during the course of the law firm's representation, on account.

Likewise, it is significant that the defendants do not dispute that, in 2009, John Privitera sent five emails to defendant, Sandy Lewis regarding the firm's outstanding invoices. Nor do they dispute that defendant, Sandy Lewis never responded to three of those emails and that as to the two emails, to which he did respond, he neither denied owing the fees, nor complained or protested any invoice or charge, stating that the defendants would pay their bills, "[a]s and when . . . able". Nor have the defendants denied receiving, in 2010, additional emails from John Privitera specifically seeking payment of the firm's outstanding bill, to which they did not respond, in writing or otherwise, protesting either the services or the amounts billed.

There is simply no genuine, material triable issue of fact to warrant denial of plaintiff's motion for summary judgment. For nearly four years, plaintiff, McNamee Lochner mailed 35 separate monthly invoices and also emailed, at least, two separate statements of account to defendants, Lewis Farm and Barbara and Sandy Lewis, and neither those invoices or the separate statements of account, nor the services of McNamee Lochner were ever criticized by the defendants, in writing or otherwise, and their self-serving, bald allegations, that defendant, Sandy Lewis orally objected to the invoices, are contradicted by their own actions and insufficient, as a matter of law, to raise a triable issue of fact that they did.

ARGUMENT

POINT I

PLAINTIFF, MCNAMEE LOCHNER, HAVING CHOSEN A PROPER VENUE, AND DEFENDANTS, LEWIS FARM AND BARBARA AND SANDY LEWIS, HAVING FAILED TO MOVE TO CHANGE THAT VENUE WITHIN 15 DAYS AFTER SERVICE OF THEIR DEMAND, AS REQUIRED BY CPLR §511(b), ARE NOT ENTITLED, AS A MATTER OF RIGHT, TO CHANGE VENUE TO ESSEX COUNTY

As an initial matter, in opposing plaintiff, McNamee Lochner's motion for summary judgment, defendants, Lewis Farm and Barbara and Sandy Lewis first seek to change venue, mistakenly believing case law provides an exception to the general rule in New York that a plaintiff may bring action in any county in which any one of the parties resides. See N.Y. C.P.L.R. §503(a) (McKinney 2006). This action was commenced in Albany County. Since plaintiff, McNamee Lochner is a resident of Albany County for venue purposes, see N.Y. C.P.L.R. §503(c) (McKinney 2006), because its certificate of incorporation filed with the Secretary of State, lists Albany County as the location of its office and, in fact, Albany County is the county in which McNamee Lochner's principal office is located, facts which the defendants do not dispute, Albany County is a proper county for this action, within the meaning of CPLR §510(1).

Relying, upon the Second Department, Appellate Division's holding in Carbonara v. Brennan, 300 A.D.2d 528, 752 N.Y.S.2d 559 (2nd Dep't 2002), and Silberstein Awad and Miklos, P.C. v. Spencer, Maston and McCarthy, LLP, 67 A.D.3d 772, 888 N.Y.S.2d 594 (2nd Dep't 2009) (citing Carbonara v. Brennan, supra), defendants, Lewis Farm and Barbara and Sandy Lewis seek to move this action, as of right, to Essex County. In Carbonara v. Brennan, supra, the Appellate Division, Second Department, held, as a general rule and not as a strict requirement, that the court in which an underlying action is litigated "is the proper forum to

determine the issue of counsel fees arising from the action". Carbonara, 300 A.D.2d at 529. This case neither applies to this action, nor provides a special exception to CPLR §503(a). In Carbonara, supra, and in Silberstein Awad and Miklos, P.C., supra, the attorney was seeking to enforce a charging lien under Judiciary Law §475. Such a lien, whether under the common law or statute, is a proceeding in rem, see Manusse v. Mattia, 10 N.Y.S.2d 495, 496 (Sup. Ct. 1939), which, pursuant to Judiciary Law §475, may be enforced in the same court in which the underlying action was litigated *or* in a separate plenary action, Haser v. Haser, 271 A.D.2d 253, 254, 707 N.Y.S.2d 47, 49 (1st Dep't 2002)(citing Miller v. Kassatly, 216 A.D.2d 260, 628 N.Y.S.2d 687).

Here, not only is plaintiff, McNamee Lochner not seeking to enforce an attorney's charging lien, rendering the holding in Carbonara v. Brennan, supra, inapplicable, even if it were, venue in Albany County would still nevertheless be permissible. Accordingly, insofar as the instant action is venued in Albany County, the chosen venue is proper. Moreover, not only is venue in Albany County proper, but also the time within which defendants, Lewis Farm and Barbara and Sandy Lewis had to challenge that venue, under CPLR §510(1), expired more than 4 months ago.

To change venue, pursuant to CPLR §510(1), on the ground that the chosen venue is improper, the defendants were required to comply with CPLR §511. This they did not do. CPLR §511 directs that a motion to change venue, pursuant to CPLR §510(1), must be preceded by a demand to change venue served with or prior to the service of an answer, N.Y. C.P.L.R. §511(a) (McKinney 2006), and made within 15 days thereafter, N.Y. C.P.L.R. §511(b) (McKinney 2006). Defendants, Lewis Farm and Barbara and Sandy Lewis served their demand for change of venue on May 3, 2012. They were therefore *required* to make their motion, adding

an additional five days for mailing as provided by the Court of Appeals in Simon v. Usher, 17 N.Y.3d 625 (2011), no later than May 23, 2012. Their failure to strictly comply with the timing requirements of CPLR §511(b) is fatal. See Hansen v. Gehl Co., 41 A.D.3d 1027, 839 N.Y.S.2d 271 (3rd Dep't 2007); Singh v. Becher, 249 A.D.2d 154, 672 N.Y.S.2d 60 (1st Dep't 1998); Pittman v. Maher, 202 A.D.2d 172, 608 N.Y.S.2d 199 (1st Dep't 1994); Philogene v. Fuller Auto Leasing, 167 A.D.2d 178, 561 N.Y.S.2d 250 (1st Dep't 1990); Wilkerson v. 134 Kitty's Corp., 49 A.D.3d 718, 854 N.Y.S.2d 169 (2nd Dep't 2008); Joyner-Pack v. Sykes, 30 A.D.3d 469, 817 N.Y.S.2d 342 (2nd Dep't 2006); Harleysville Ins. Co. v. Ermar Painting and Contracting, Inc., 8 A.D.3d 229, 777 N.Y.S.2d 661 (2nd Dep't 2004); Runcie v. Cross Country Shopping Mall, 268 A.D.2d 577, 702 N.Y.S.2d 612 (2nd Dep't 2000); compare Beardsley v. Wyoming Co. Comm. Hosp., 42 A.D.2d 821, 345 N.Y.S.2d 790 (4th Dep't 1973).

Accordingly, in addition to the chosen venue of Albany County being proper, insofar as defendants, Lewis Farm and Barbara and Sandy Lewis failed to move within 15 days of the service of their demand for change of venue, they forfeited their right to change venue, pursuant to CPLR §510(1), and are not entitled to such relief.

POINT II

DEFENDANTS, HAVING FAILED TO ESTABLISH THAT THE CONVENIENCE OF ANY MATERIAL NON-PARTY WITNESS WILL BE PROMOTED BY A CHANGE OF VENUE TO ESSEX COUNTY, ARE FURTHER NOT ENTITLED TO A DISCRETIONARY TRANSFER OF VENUE, PURSUANT TO CPLR 510(3)

In addition to seeking a change of venue, as of right, pursuant to CPLR §510(1), defendants, Lewis Farm and Barbara and Sandy Lewis, alternatively move, pursuant to CPLR §510(3), for a discretionary change of venue to Essex County. CPLR §510(3) states that "[t]he court, upon motion, may change the place of trial of an action where . . . the convenience of material witnesses and the ends of justice will be promoted by the change". N.Y. C.P.L.R.

§510(3) (McKinney 2006). In support of their CPLR §510(3) motion, the defendants identify, by description, one witness who they claim may have knowledge pertinent to their defense. Specifically, defendants' counsel in his affidavit notes "[i]t is presumed that non-party witnesses from the Adirondack Park Agency will be called to testify at trial, including the Agency's custodian of records." (Brennan Affid., ¶54). Defendants, however, are required to do more than merely assert the existence of possible unnamed witnesses. They were required to satisfy a rigorous set of four evidentiary requirements, which they did not do.

First, defendants, Lewis Farm and Barbara and Sandy Lewis were required to submit an affidavit in support of their motion, containing the names, addresses and occupations of the prospective non-party witnesses for whose convenience, they seek to change venue. Second, the defendants were required to disclose, in sufficient detail, the facts to which each identified proposed non-party witness would testify at trial, so that the court may judge whether the proposed evidence of the witness is necessary and material. Third, defendants had to show that the witness for whose convenience the change of venue is sought is in fact willing to testify. And finally, defendants needed to show how each witness in question will in fact be inconvenienced if a change of venue is not granted. E.g. Frontier Ins. Co. in Rehabilitation v. Big Apple Roofing Co., Inc., 50 A.D.3d 1239, 855 N.Y.S.2d 702 (3rd Dep't 2008); Andros v. Roderick, 162 A.D.2d 813, 557 N.Y.S.2d 722 (3rd Dep't 1990); Hojohn v. Hamilton, 78 A.D.2d 570, 432 N.Y.S.2d 266 (3rd Dep't 1980); see e.g. Walsh v. Mystic Tank Lines Corp., 51 A.D.3d 908, 859 N.Y.S.2d 233 (2nd Dep't 2008); O'Brien v. Vassar Brothers Hosp., 207 A.D.2d 169, 622 N.Y.S.2d 284 (2nd Dep't 1995); Cardona v. Aggressive Heating, Inc., 180 A.D.2d 572, 580 N.Y.S.2d 285 (1st Dep't 1992); Rochester Drug Co-Operative, Inc. v. Marcott Pharmacy North Corp., 15 A.D.3d 899, 789 N.Y.S.2d 779 (4th Dep't 2005).

Here, defendants, Lewis Farm and Barbara and Sandy Lewis have alleged none of these requirements. Though their attorney's affidavit mentions the APA's custodian of records as a possible witness, they submit no affidavit containing the name, address or occupation of any specific APA employee or any other prospective non-party witness. They disclose no facts to which any identified, non-party witness will testify to permit a finding of the necessity and materiality of any witness's testimony, including no statement as to the material and pertinent facts to which the APA's custodian of records or any other APA employee will testify. Nor have the defendants demonstrated that any APA employee or any other non-party witness has been contacted, and found to be available and willing to testify on their behalf. Likewise, the defendants have further failed to explain the manner or extent to which any potential non-party witness from the APA, or any other non-party witness, will be inconvenienced by the venue of this action in Albany County.

The defendants themselves are not witnesses for the purpose of deciding the motion pursuant to CPLR §510(3). See O'Brien v. Vassar Brothers Hosp., 207 A.D.2d 169, 173, 622 N.Y.S.2d 284, 287 (2nd Dep't 1995). Moreover, despite defendants' claim to the contrary, plaintiff, McNamee Lochner has neither identified, nor retained any expert to give testimony on its behalf in this action, but even if it had, the convenience of any expert, whether retained by plaintiff or defendants, as a matter of law, is irrelevant and excluded from the court's consideration in fixing venue, under CPLR §510(3). See LaDuke v. Bond, 284 A.D. 859, 134 N.Y.S.2d 155 (3rd Dep't 1954).

Therefore, because defendants, Lewis Farm and Barbara and Sandy Lewis have failed to identify and establish that the convenience of any material non-party witness will be promoted

by a change of venue, transfer to Essex County is unwarranted and relief to which, as a matter of law, they are not entitled.

POINT III

THE LACK OF DISCOVERY IN THIS ACTION DOES NOT WARRANT DENIAL OF PLAINTIFF'S SUMMARY JUDGMENT MOTION AS PREMATURE

Next, in opposing plaintiff, McNamee Lochner's motion for summary judgment, defendants, Lewis Farm and Barbara and Sandy Lewis procedurally argue plaintiff's motion should be denied as premature because they have conducted no discovery. Specifically, defendants allege, "plaintiff, it[s] partners, and its employees, have particular personal knowledge of the objections rendered by the defendants to plaintiff's monthly invoices", (Brennan Affid., ¶41), and should therefore, "be entitled to depose Mr. Privitera, Esq. and Mr. Lamme, Esq. with respect to their personal knowledge of the Defendants' objections", (Brennan Affid., ¶41), and seek document discovery "of plaintiff's internal memos, reports, and communications regarding the preparation of the firm's invoices for the defendants, the mailing said invoices, and any objections thereto by the defendants", (Brennan Affid., ¶42).

Defendants, Lewis Farm and Barbara and Sandy Lewis, try as they do, cannot prevent this court from granting plaintiff, McNamee Lochner summary judgment by claiming a need for discovery, unless some evidentiary basis is offered to suggest that discovery is likely to lead to relevant evidence or might otherwise lead to facts relevant to the issues, and that the needed proof is within the exclusive knowledge of plaintiff, McNamee Lochner. See Id.; Bailey v. New York City Tr. Auth., 270 A.D.2d 156, 704 N.Y.S.2d 582 (1st Dep't 2000); Voluto Ventures, LLC v. Jenkins Gilchrist Parker Chapin LLP, 44 A.D.3d 557, 843 N.Y.S.2d 630 (1st Dep't 2007). To suggest the defendants need to depose plaintiff, or obtain from plaintiff documents, to discover knowledge and information of any objections they may have made concerning the firm's

invoices is ludicrous. Defendants particularly do not need discovery from plaintiff as to whether they ever protested plaintiff's bills as that is a matter exclusively within their own knowledge. See Duane Morris LLP v. Astor Holdings Inc., 61 A.D.3d 418, 419, 877 N.Y.S.2d 250, 252 (1st Dep't 2009); Geron v. DeSantis, 89 A.D.3d 603, 604, 933 N.Y.S.2d 260, 262 (1st Dep't 2011). Nor is it necessary for the defendants to obtain discovery concerning the law firm's preparation and mailing of its invoices. Not only has McNamee Lochner submitted an uncontested affidavit as to the firm's regular practice and procedure for mailing client invoices, and in particular, as to the preparation and mailing of the invoices at issue, (see Hill Affid., ¶¶1-5), the defendants do not dispute their receipt and admit having received them, (see Lewis and Baillie Affid(s), generally, and specifically, Lewis Affid., ¶¶5, 17; Baillie Affid., ¶5)

Thus, to deny plaintiff's summary judgment motion to allow the defendants to conduct a fishing expedition, based upon nothing more than "hope and conjecture," see J.K. Tobin Constr. Co., Inc. v. David J. Hardy Constr. Co., Inc., 64 A.D.3d 1206, 1208, 883 N.Y.S.2d 681, 684 (4th Dep't 2009); Voluto Ventures, LLC, 44 A.D.3d at 557, to obtain information regarding the defendants' objections to plaintiff's invoices, which if such information, in fact existed, is within their own exclusive knowledge, is unwarranted.

POINT IV

DEFENDANTS' ALLEGED ORAL STATEMENTS REGARDING PLAINTIFF'S INVOICES ARE INSUFFICIENT TO RAISE AN ISSUE OF FACT

Defendants, Lewis Farm and Barbara and Sandy Lewis next substantively oppose plaintiff's summary judgment motion, claiming they orally objected to the law firm's invoices. Principally, the defendants rely upon one specific oral statement, which was purportedly, repeatedly made by defendant, Sandy Lewis throughout McNamee Lochner's representation. In his affidavit, defendant, Sandy Lewis maintains that, "[b]eginning early 2009, upon receipt of

each monthly invoice from Plaintiff's firm", he stated to John Privitera, shareholder of plaintiff, McNamee Lochner and the attorney from the firm, who represented the defendants, that "'We will look at this matter and your invoices when the case is done, not before'". (Lewis Affid., ¶5). Assuming as true, that such a statement was made, it is palpably insufficient to give notice of a dispute as to any invoice, or of any service or charge in an invoice or that the defendants were refusing payment, and thus qualify as an objection to the firm's bills. See Zanani v. Schvimmer, 50 A.D.3d 445, 446, 856 N.Y.S.2d 65 (1st Dep't 2008) (reversing denial of plaintiff's motion for summary judgment on an account stated, in part, because defendant's asserted oral objection, that she had discussed plaintiff's outstanding fees with him and stated "that when the matter was concluded she would 'address the issue with him'" was, as a matter of law, insufficient); see also Shea & Gould v. Burr, 194 A.D.2d 369, 598 N.Y.S.2d 261 (1st Dep't 1993).

The law on accounts stated, which is well established in attorneys' fee recovery cases, is grounded on the premise that a client is *obligated* to object to bills within a reasonable time after receipt, or the law will generally conclude acceptance of them. For defendant, Sandy Lewis to therefore suggest that he was unilaterally free to ignore McNamee Lochner's monthly invoices until the matters were concluded, for nearly four years, flouts not only his agreement with plaintiff to pay for its services, but also the law. Further, defendants' claimed oral objection is contradicted by the numerous emails from John Privitera to Sandy Lewis, and between them. (Privitera Affid., ¶¶12-17; Ex(s). F-N). In 2009, John Privitera sent five emails to defendant, Sandy Lewis seeking payment of the firm's outstanding invoices. (Prititera Affid., ¶¶12-15; Ex(s). F-I). In response, defendant, Sandy Lewis expressed an intention to pay, never once responding critically or negatively about the invoices sent, or objecting to or complaining about or bringing to Mr. Privitera's attention any questions, complaints or problems with any specific

charge. (Privitera Affid., ¶¶12; 15; Ex(s). F; I). And in 2010, John Privitera sent defendant, Sandy Lewis four more emails seeking payment, to which defendant, Sandy Lewis also never responded critically or negatively about any invoice, or object to or complain about or bring to plaintiff's attention any questions, complaints or problems with any specific charge. (Privitera Affid., ¶¶16-17; Ex(s). K-N). Not until after plaintiff's representation of the defendants had ended, did the defendants give any indication they would not pay plaintiff's bills. Even then they never objected to any specific invoice or charge, but rather suggested for the first time that they wished to renegotiate the terms of the parties agreement. (Lewis Affid., Ex. G, letter dated June 10, 2011 from John Privitera).

Secondarily, the defendants assert defendant, Sandy Lewis orally objected to plaintiff's invoices by generally stating, "I am sick of this excess, you are running up time", once to John Privitera in late 2008 and once to the associate assisting on the matters in early 2009, (Lewis Affid., ¶8), and by stating, to some unidentified person, at some unspecified time that they would pay no more, (Lewis Affid., ¶9). Again assuming as true that these statements were made, such occasional, random and vague "self-serving, bald allegations of oral protests", as these, are equally insufficient as a matter of law to raise an issue of fact as to the existence of an account stated. See Schulte Roth & Zabel, LLP v. Kassover, 80 A.D.3d 500, 916 N.Y.S.2d 41 (1st Dep't 2011); see also Berkman Bottger & Rodd, LLP v. Moriarty, 58 A.D.3d 539, 871 N.Y.S.2d 135 (1st Dep't 2009). Furthermore, even if the defendants' alleged oral statements were meant to complain that plaintiff's invoices were excessive, that would be insufficient to avoid summary judgment. See Thelan LLP v. Omni Contracting Co., Inc., 79 A.D.3d 605, 606, 914 N.Y.S.2d 119, 120 (1st Dep't 2010); Berkman Bottinger & Rodd, 58 A.D.3d 539. And finally, defendants' argument that an account stated was never created because they never acquiesced or agreed to

pay the firm's invoices, (Lewis Affid., ¶4), is also belied by the fact that they made partial payments on the account. (Privitera Affid., ¶; Lewis Affid., ¶9).

General allegations of protest are not enough, specific objection to an invoice or charge is required. See Levine v. Harriton & Furrer, LLP, 92 A.D.3d 1176, 1179, 940 N.Y.S.2d 334, 338-39 (3rd Dep't 2012) (quoting 1000 N. of N.Y. Co. v. Great Neck Med. Assoc., 7 A.D.3d 592, 593, 775 N.Y.S.2d 884 (2nd Dep't 2004). None of the defendants' alleged objections, however, are grounded in the particulars of the invoices. Defendants simply do not allege that they have ever objected to any particular invoice, nor any specific charge, and even now, albeit untimely, as a matter of law, see Shea & Gould, 194 A.D.2d at 371; R.P.I. Professional Alternatives Inc. v. Kelly Servs. Inc., 26 Misc.3d 1213(A), 907 N.Y.S.2d 103 (Sup. Ct. 2010), they fail to specify any particular invoice or amount in any invoice to which they object. Accordingly, defendants, Lewis Farm and Barbara and Sandy Lewis have fallen far short of demonstrating *any* objection to *any* invoice or charge to raise a question of fact as to the existence of an account stated.

POINT V

THERE ARE NO EQUITABLE CONSIDERATIONS WHICH PRECLUDE THE GRANTING OF SUMMARY JUDGMENT ON ACCOUNT STATED

Lastly, defendants, Lewis Farm and Barbara and Sandy Lewis allege there exists "other equitable considerations" to warrant denial of plaintiff's summary judgment motion for an account stated. The crux of defendants' "equitable" argument challenges the propriety and reasonableness of plaintiff's legal fees on two fronts. On the one front, they seek to litigate the reasonable value of plaintiff's fees claiming, "they were aware that a claim for attorney's fees would be made under the state's equal access to justice act", (Brennan Affid., ¶48), and unbeknownst to plaintiff, had apparently decided to rely upon the court's determination as to

what the APA should pay them, to determine what amount they should pay plaintiff. On the other front, defendants claim the reasonable value of plaintiff's legal services was already litigated when the court ordered the APA to pay certain attorneys' fees and expenses to Lewis Farm, pursuant to New York's EAJA, which the defendants admittedly never paid over to plaintiff. Neither has any basis in fact, or in law, and are but diversions meant to distract.

Regardless of when the defendants became *aware* that an application would be made, under the EAJA, to recover counsel fees and expenses from the APA, it was never *agreed*, nor do the defendants allege that it was, that McNamee Lochner's fee was dependent upon, or would be limited to whatever counsel fees and expenses *might* be awarded under the EAJA. (Privitera Affid., ¶18). In addition to which, defendants neither claim the amounts set forth in plaintiff's invoices, nor the services detailed therein are inconsistent in any manner with their knowledge of the services, which plaintiff performed, or the rates at which they agreed to pay for those services. Similarly, defendants' argument that plaintiff's fees are unreasonable is without factual support, and ignores that where there is an account stated, the law provides that it is unnecessary to separately establish the reasonableness of the fees. See O'Connell & Aronowitz v. Gullo, 229 A.D.2d 637, 638, 644 N.Y.S.2d 870 (3rd Dep't 1996).

In attacking the reasonableness of plaintiff's invoices, defendants, in part, falsely accuse plaintiff of some "misuse of the legal process" pertaining to their billing records and, in particular, the billing records submitted to the court on defendant, Lewis Farm's fee application under the states EAJA. This is simply not true. Defendant, Sandy Lewis, though he believes he has undertaken a noble crusade to expose the truth, exposes little more than his ignorance of the law and the prior proceedings in which Lewis Farm was awarded certain of its attorneys' fees and expenses from the APA, under the EAJA. Nothing was withheld from the Supreme Court of

Essex County. The fees awardable under the EAJA were limited, as provided by CPLR §8602(b), and as explained by Judge Meyer himself, to those services performed only in connection with Action No. 3. See N.Y. C.P.L.R. §8602(b) (McKinney Supp. 2012); see also Lewis Family Farm, Inc. v. New York State Adirondack Park Agency, 26 Misc.3d 1219(A), 2010 WL 424145 (Sup. Ct. 2010). Judge Meyer's Decision and Order dated February 3, 2010, (Privitera Affid., Ex. O), made plain expenses could not be awarded to Lewis Farm for the "administrative proceeding", known as the Enforcement Proceeding, "defense of the state's enforcement action", known as Action No. 4 or "expenses related to the 2007 proceeding or its appeal from the dismissal thereof", known as the Appellate Proceeding. Recovery of the fees incurred in the Enforcement Proceeding, the Appellate Proceeding and Action No. 4 was simply not available. The full amount billed by plaintiff, McNamee Lochner, up to the date of defendant, Lewis Farm's application for counsel fees, under the EAJA, therefore could not be, and was not submitted or awarded. Plain and simple, the alleged discrepancies with which defendants seek to divert this court's attention are much ado about nothing.

Finally, neither this motion, nor this action is precluded by the award of counsel fees made by the Supreme Court, Essex County to Lewis Farm under the doctrine of issue preclusion. McNamee Lochner was not a party to those proceedings. Nor was the agreement among McNamee Lochner and the defendants for the law firm's services or the invoices issued, and what, if any, legal fees Lewis Farm and Barbara and Sandy Lewis owed the firm, pursuant to their agreement and those invoices, before the court. New York's EAJA controlled only what the APA would have to pay to Lewis Farm, as a prevailing plaintiff, not what defendant, Lewis Farm or defendants, Barbara and Sandy Lewis must pay plaintiff. And there is absolutely nothing on the face of the EAJA that prevents Lewis Farm's statutory award of fees from

coexisting with the defendants' private fee arrangement with McNamee Lochner, even though the fee that the defendants owe under their private fee arrangement with McNamee Lochner is greater than the statutory attorney's fees that could be or were awarded to Lewis Farm. The doctrine of issue preclusion simply and unquestionably does not prevent plaintiff, McNamee Lochner from seeking the full amount of its unpaid legal fees from defendants, Lewis Farm and Barbara and Sandy Lewis or prevent this court from granting judgment, as a matter of law, in favor of McNamee Lochner on an account stated. (See plaintiff's Memo of Law, dated July 13, 2012, Point III).

CONCLUSION

There can be no doubt, plaintiff McNamee Lochner has demonstrated entitlement to summary judgment on its first cause of action for an account stated. Plaintiff has proven, and there is no dispute, that they were retained by defendant, Lewis Farm and defendants, Barbara and Sandy Lewis, and submitted periodic, detailed bills to the defendants for the services they rendered, to which the defendants never objected to any invoice or any specific charge and upon which they made partial payments, and continued to request, and accept plaintiff's services until the matter for which the defendants had retained plaintiff was successfully concluded. Accordingly, plaintiff, McNamee Lochner's motion for summary judgment on its first cause of action against defendant, Lewis Farm and defendants, Barbara and Sandy Lewis for an account stated, dismissing defendants' affirmative defenses and awarding prejudgment interest on the outstanding legal fees, should be granted.

Dated: October 9, 2012

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

McNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.,

Plaintiff,

- against -

LEWIS FAMILY FARM, INC., BARBARA LEWIS and SALIM B. LEWIS,

Defendants.

AFFIDAVIT OF SERVICE

Index No. 2184-12

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:

KAREN P. BLAISDELL, being duly sworn, deposes and says:

That she is over the age of eighteen years and resides at Edwards Road, Wynantskill, New York, and that she served **Memorandum of Law in Opposition to Defendants' Cross-Motion for Change of Venue and Reply Memorandum of Law in Further Support of Plaintiff's Motion for Summary Judgment**, on the following person at the following time and place in the following manner:

On October 9, 2012, upon: Joseph R. Brennan, Esq.
Brennan & White, LLP
163 Haviland Road
Queensbury, New York 12804

by depositing a true and correct copy of the same, enclosed in a postpaid and properly addressed envelope, in an official depository maintained and exclusively controlled by the U.S. Postal Service within New York State, directed to each person at respective address(es), that being the address(es) within the state designated for that purpose upon the last papers in this action or the place where the above then resided or kept offices according to the best information which can be conveniently obtained at this time.

Karen P. Blaisdell
KAREN P. BLAISDELL

Sworn to before me this 9th day of October, 2012.

Kathleen Comtois
Notary Public - State of New York
Qualified in Albany County
Commission Expires: 02/28/2014