STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

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

Plaintiff,

-against-

DECISION AND ORDER

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

Defendants.

Index No. 2184-12

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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Attorneys for Plaintiff
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Attorneys for Defendants
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Hon. Richard M. Platkin, A.J.S.C.

By this action, the law firm of McNamee, Lochner, Titus & Williams, P.C. ("MLT&W") sues to recover an unpaid balance allegedly due from defendants Lewis Family Farm, Inc. ("Lewis Family Farm" or "the Farm"), Barbara Lewis and Salim (Sandy) B. Lewis (collectively "the Lewis Defendants" or "defendants"). MLT&W now moves for summary judgment on its account-stated cause of action. Defendants oppose the motion and cross-move for a change in venue.

BACKGROUND

Defendant Lewis Family Farm owns and operates a large organic farm in the Town of Essex, which is located within the Adirondack Park. On or about September 7, 2007, MLT&W was retained by the Farm to represent it in two separate but related proceedings involving the Adirondack Park Agency ("APA"): an administrative enforcement proceeding and the appeal from a declaratory judgment action. MLT&W thereafter was retained to represent the individual defendants and the Farm in two additional cases arising out of the APA's enforcement efforts. In November 2008, Supreme Court, Essex County issued a Decision & Order that ruled in favor of the Lewis defendants, and the Appellate Division, Third Department affirmed in July 2009.

Thereafter, the Farm moved pursuant to CPLR article 86 for an award of counsel fees incurred in litigating against the APA. In a Decision and Order dated November 17, 2010 ("Fee Decision"), Supreme Court, Essex County awarded the Farm a total of $71,690.28, including $3,796.53 in expenses. Following an unsuccessful attempt at reargument, the Lewis defendants agreed to accept the fee determined by the Court in satisfaction of its claims against the APA. Following MLT&W's unsuccessful attempts to collect upon its unpaid invoices, plaintiff commenced this action in April 2012.

ANALYSIS

A. Venue

The Court begins with defendants' cross-motion to transfer venue to Essex County pursuant to CPLR 510 (1) and (3). Defendants first argue that since the underlying litigation took place in Supreme Court, Essex County, that court is the proper forum for determination of plaintiff's claim for attorney's fees arising out of the litigation. Defendants further argue that a discretionary change of venue is appropriate for the convenience of the witnesses and for reasons of judicial economy.

Defendants recognize that they are not entitled to a change of venue on the ground that Albany County is not proper (*see* CPLR 510 [a]) because their motion was not made in accordance with the procedures and limitations established by CPLR 511 (a) and (b) (*see Thomas v Guttikonda*, 68 AD3d 853, 854 [2d Dept 2009]). Nonetheless, defendants argue that the Court should exercise its discretion to transfer this action to Essex County as the situs of the underlying litigation. In this connection, defendants direct the Court's attention to *Carbonera v Brennan* (300 AD2d 528 [2d Dept 2002]) and *Silberstein, Awad and Miklos, P.C. v Spencer, Maston and McCarthy, LLP* (67 AD3d 772 [2d Dept 2009]), which are claimed to stand for the proposition 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.

The Court does not find these contentions to be persuasive. As defendants acknowledge, they have waived any claim that Albany is an improper county by failing to move for a change of venue in accordance with the procedures and within the timeframe established by CPLR 511. And the case authorities cited by defendants concern proceedings between attorneys based upon a claimed charging lien (*see* Judiciary Law § 475), an equitable remedy that requires a fact-

specific analysis of the circumstances following the first attorney's discharge and the reasonable value of the legal services rendered by such counsel. Here, plaintiff proceeds principally upon on its account-stated cause of action, which does not require consideration of the reasonableness of the claimed attorney's fee or otherwise necessitate consideration of the conduct of the underlying litigation (*see Lapidus & Assoc., LLP v Elizabeth St., Inc.*, 92 AD3d 405, 405-406 [1st Dept 2012]). As such, the Court does not see the interests of judicial economy served by a transfer of venue at this juncture.

Moreover, insofar as defendants seek a change of venue under CPLR 510 (3) based upon the convenience of the witnesses, the cross-motion is not supported by the names, addresses and occupations of the witnesses whose convenience allegedly will be affected, proof that these witnesses have been contacted and are willing to testify for defendants, the substance of each such witness's testimony, and a basis for concluding that these witnesses' testimony is material and necessary (*Andros v Roderick*, 162 AD2d 813, 814 [3d Dept 1990]). In this connection, the Court notes that the convenience of party witnesses is of no moment under CPLR 510 (3).

Accordingly, the Court concludes that defendants have failed to meet their burden of demonstrating an entitlement to a discretionary change of venue.

B. Summary Judgment (Account Stated)

On a motion for summary judgment, the burden of going forward in the first instance rests upon the moving party, who must come forward with proof, in admissible form, to demonstrate entitlement to judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [citation omitted]). Once the movant has made such a showing, the burden then shifts to the opposing party to demonstrate, also by competent proof, the existence of a triable issue of material fact

(*see Zuckerman v City of New York, supra,* at 562; *Romano v St. Vincent's Med. Ctr of Richmond,* 178 AD2d 467 [2d Dept 1991]).

"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. The agreement may be express or, as here, implied from the retention of an account rendered for an unreasonable period of time without objection and from the surrounding circumstances" (*Jim-Mar Corp. v Aquatic Constr.*, 195 AD2d 868, 869 [3d Dept 1993] [internal citations omitted]).

Here, plaintiff submits the affidavit of Kathleen L. Hill, who describes MLT&W's billing practices and offers proof that she began mailing monthly invoices to defendants on or about December 31, 2007. These invoices detailed the professional services rendered to defendants, the time charged, the hourly billing rates, disbursements advanced on defendants' behalf, the unpaid balance carried forward from prior invoices, the total new charges and the total balance due. Copies of all of these invoices are annexed to plaintiff's moving papers. Additionally, plaintiff submits the affidavit of John Privitera, Esq., the attorney at MLT&W who represented the Lewis defendants. His affidavit details the legal services that the law firm rendered to defendants and describes the firm's efforts to collect the unpaid legal fees from defendants. Additionally, Attorney Privitera presents proof that defendants did not object to the invoices and that they made partial payments on the account: $11,693.20 received from a Lewis Family Farm business account and three payments of $25,000 each, made on a credit card held in the name of Barbara Lewis. The Court is satisfied that plaintiff's submissions demonstrate its prima facie entitlement to judgment as a matter of law.

In opposition, defendants argue: (1) the doctrine of issue preclusion bar plaintiff from re-litigating the issue of attorney's fees previously decided in the CPLR article 86 proceeding; (b) the motion is premature; and (c) triable issue of fact preclude the granting of judgment as a matter of law.

"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. . . .'" (*Parker v Blauvelt Volunteer Fire Co.*, 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" (*id.*). "[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding" (*Ryan*, 62 NY2d at 501).

Here, defendants argue that the reasonable value of plaintiff's legal services was raised and decided in the context of the fee proceeding, with the Court awarding the Lewis defendants only 31% of their requested fee. Defendants further assert that MLT&W had a "full and fair opportunity to contest the reasonable value of its fee" in that proceeding.

The Court finds defendants' invocation of the doctrine of collateral estoppel to be misplaced. It is apparent from the Fee Decision that the Court's reduction of the Lewis defendants' fee request was based upon its application of CPLR article 86. Thus, the Court declined to award fees "for time expended" on any proceeding other than the successful challenge to the March 25, 2008 administrative determination of the APA, for "'strategy

discussions and conferences with LFF's corporate principals" and "for time expended in dealing with the media". The Court also lowered the requested hourly billing rate, based upon its findings as to the "prevailing market rates for the kind and quality of the [legal] services furnished" (CPLR 8601 [a]).

Thus, the only issue actually and necessarily decided in the Fee Decision was the State's obligation to reimburse the Lewis defendants for counsel fees pursuant to CPLR article 86. This determination is in no way conclusive of the Lewis defendants' obligation to their former counsel. Indeed, CPLR article 86 clearly states that "[n]othing contained in this article shall affect or preclude the right of any party to recover fees or other expenses authorized by common law" (CPLR 8605 [c]). In addressing a similar, federal statutory scheme, the United States Supreme Court has explained that the fee-shifting statute "controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer. What a plaintiff must be bound to pay and what an attorney is free to collect under a fee arrangement are not necessarily measured by the 'reasonable attorney's fee' that a defendant must pay pursuant to court order" (*Venegas v Mitchell*, 495 US 82, 90 [1990]). And as noted previously, an attorney's claim for legal fees under an account-stated cause of action does not require consideration of the reasonableness of the fee sought (*see Lapidus*, 92 AD3d at 405-406).

As defendants have failed to demonstrate that the issue decided in the CPLR article 86 proceeding is identical to the issue before the Court on plaintiff's cause of action for account stated, their reliance on the doctrine of collateral estoppel must be rejected.

The Court further concludes that defendants' submissions in opposition to the motion fail to raise a triable question of fact. While defense counsel argues principally that defendants contemporaneously objected to plaintiff's invoices, they fail to substantiate this contention with proof in admissible form. The only specific "objection" referenced in the affidavit of Sandy Lewis is the claim that he advised Attorney Privitera in early 2009[1] and upon receipt of each monthly invoice that "[w]e will look at this matter and your invoices when the case is done, not before" (¶ 5). However, these alleged statements fall well short of constituting an objection to the invoices (*see Zanani v Schvimmer*, 50 AD3d 445, 446 [1st Dept 2008] [defendant "does not even assert that she objected to the bills, only that she 'discussed' plaintiff's outstanding fees with [counsel] and told him that when the matter was concluded she would 'address the issue with him'"]). The remaining so-called "objections" relied upon by Mr. Lewis merely are "self-serving, bald allegations of oral protests" that "are insufficient to raise a triable issue of fact as to the existence of an account stated" (*Titan Communications, Inc. v Diamond Phone Card, Inc.*, 94 AD3d 740, 742 [2d Dept 2012] [internal quotation marks omitted]). As such, defendants have failed to demonstrate that they raised any specific objection to any invoice or to any charge set forth in such an invoice.[2]

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[1] As noted above, MLT&W began invoicing defendants on or about December 31, 2007.

[2] The Court notes, but does not and need not rely upon: (a) Mr. Lewis's emails to his former counsel, in which he expressed an intention to pay MLT&W's invoices when he financially was able and never once raised any objection or complaint with respect to the firm's invoices; (b) defendants' partial payments of the firm's invoices, which were not accompanied by any objection or complaints regarding the unpaid balances; and (c) defendants' submissions to the Court in the CPLR article 86 proceeding, including Sandy Lewis's affidavits, which acknowledged defendants' obligation "to pay $289,292.69 to McNamee, Lochner . . . for its services", disclaimed any concern with the amount of the firm's invoices and attested to MLT&W's "devotion to justice, to [defendants], and to the farm."

Finally, defendants' argument that plaintiff's motion is premature in the absence of further disclosure is without merit. CPLR 3212 (f) provides that summary judgment may be denied as premature where the party opposing summary judgment demonstrates how further discovery might reveal the existence of evidence within the exclusive knowledge of the movant that would warrant denial of the motion (*Green v Covington*, 299 AD2d 636, 637 [3d Dept 2002]; *Landes v Sullivan*, 235 AD2d 657 [3d Dept 1997]; *Halsey v County of Madison*, 215 AD2d 824, 824-825 [3d Dept 1995]). Defendants' papers fail to make such a showing here.

CONCLUSION

Accordingly,[3] it is

ORDERED that defendants' cross-motion for a change of venue is denied; and it is further

ORDERED that plaintiff's motion for summary judgment on its account stated cause of action is granted in all respects; and finally it is

ORDERED that plaintiff shall settle judgment on notice to defendants within 30 days.

This constitutes the Decision and Order of the Court. The original Decision and Order is being returned to plaintiff's counsel; all other papers are being transmitted to the Albany County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220, and counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and notice of entry.

[3] The Court has considered defendants' remaining arguments and contentions and finds them unavailing or irrelevant to the disposition ordered herein.

Dated: Albany, New York
January 8, 2013

RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

Notice of Motion, dated July 13, 2012;
Affidavit of John Privitera, Esq., sworn to July 11, 2012, with attached exhibits A-Q;
Affidavit of Kathleen L. Hill, sworn to July 11, 2012, with attached exhibit R;
Plaintiffs' Memorandum of Law, dated July 13, 2012;
Notice of Cross-Motion, dated September 17, 2012;
Affidavit of Joseph R. Brennan, Esq., sworn to September 17, 2012, with attached exhibits A-H;
Affirmation of Martina A. Baillie, Esq., dated September 17, 2012;
Affidavit of Salim B. "Sandy" Lewis, sworn to September 17, 2012;
Defendants' Memorandum of Law, dated September 17, 2012;
Plaintiff's Memorandum of Law, dated October 9, 2012;
Reply Affidavit of Eric C. Schwenker, Esq., sworn to October 12, 2012;
Defendants' Reply Memorandum of Law, dated October 12, 2012.