

Slip Copy, 14 Misc.3d 1224(A), 2007 WL 258305 (Table) (N.Y.Sup.), 2007 N.Y. Slip Op.
50149(U)
Supreme Court, New York County, New York.

MORGAN, LEWIS & BOCKIUS LLP, Plaintiff,
v.
IBUYDIGITAL.COM, INC., Defendant.
No. 604442-2005.
Jan. 11, 2007.

DECISION AND ORDER

[ROSALYN RICHTER](#), J.

**1* In this action, plaintiff-law firm Morgan, Lewis & Bockius LLP (“Morgan Lewis”) alleges that its former client, defendant IBuyDigital.com, Inc. (“IBuy”), failed to pay legal bills totaling nearly \$800,000. The complaint alleges two causes of action: account stated and *quantum meruit*. In its answer, IBuy asserts numerous affirmative defenses and counterclaims alleging breach of contract, legal malpractice, fraud, fraudulent inducement and breach of fiduciary duty. In this motion, Morgan Lewis seeks summary judgment on the account stated claim and dismissal of all of IBuy’s affirmative defenses and counterclaims. IBuy cross-moves to dismiss the complaint in its entirety or, in the alternative, to dismiss the *quantum meruit* claim and to limit the dollar amount of Morgan Lewis’s alleged damages.

On October 25, 2004, Morgan Lewis and IBuy entered into a letter of engagement whereby Morgan Lewis agreed to provide certain legal services for IBuy. The beginning of the letter states: “[Morgan Lewis] appreciates the opportunity to provide legal services for [IBuy] and related companies in connection with [IBuy’s] proposed initial public offering [“IPO”] and general corporate matters.... Notwithstanding anything in this letter to the contrary, [Morgan Lewis’s] fee for services in connection with the proposed IPO will not be more than \$425,000, plus disbursements, if any, made by [Morgan Lewis] on [IBuy’s] behalf.” The engagement letter further provided that Morgan Lewis would bill IBuy monthly but that the fees would not be due and payable “until the consummation of the IPO.” If, however, the IPO transaction was not completed by March 2005, Morgan Lewis and IBuy agreed to work out a “plan to pay the outstanding fees over a several-month period.”

In its cross-motion, IBuy argues that the entire complaint must be dismissed for failing to comply with [22 N.Y.C.R.R. § 1215.1](#). That regulation provides that an attorney who undertakes to represent a client shall provide the client with a written letter of engagement that includes: (1) an explanation of the scope of legal services to be provided; (2) an explanation of attorney’s fees to be charged, expenses and billing practices; and (3) where applicable, shall provide that the client may have a right to arbitrate fee disputes. See [22 N.Y.C.R.R. § 1215.1\[b\]](#). IBuy argues that the engagement letter fails to satisfy any of these three requirements and as a result, Morgan Lewis is barred from seeking recovery of its legal fees.

The Court denies IBuy’s motion to dismiss the complaint. To begin, the regulation contains no provision stating that failure to comply with its requirements bars a fee collection action. Indeed, the regulation is silent as to what penalty, if any, should be assessed against an attorney who fails to abide by the rule. Furthermore, IBuy has cited no controlling authority, nor has this Court found any, that would allow the Court to dismiss the complaint for alleged deficiencies in an engagement letter. Almost all of the lower court cases cited by IBuy are distinguishable because they involved situations

where there was no engagement letter or retainer agreement at all. Here, in contrast, there is a written agreement that sets forth the terms of Morgan Lewis's representation of IBuy. Thus, the cases relied upon by IBuy do not support the proposition that this Court must dismiss the complaint for alleged failure to comply with [22 N.Y.C.R.R. § 1215.1](#).^{FN1}

[FN1](#). The Court cannot consider IBuy's alternative argument, raised for the first time in reply papers, that the complaint should be dismissed because it fails to specifically state that the dispute is not covered by the fee arbitration regulations. See [Ritt v. Lenox Hill Hospital, 182 A.D.2d 560, 582 N.Y.S.2d 712 \(1st Dept.1992\)](#) (new arguments improperly raised for the first time in reply papers are entitled to no consideration).

*2 Even if the Court had the authority to dismiss the complaint due to Morgan Lewis's failure to abide by the regulation, the engagement letter here is not so deficient as to warrant such a drastic remedy. See [In re Estate of Feroletto, 6 Misc.3d 680, 683, 791 N.Y.S.2d 809 \(Surr.Ct.Bx.Cty.2004\)](#) (court allowed legal fees where there was no engagement letter or retainer agreement, noting that it would be unduly harsh to unjustly enrich the client where the attorney's failure to comply with the rule was unintentional). It is true that the engagement letter does not fully explain the precise scope of Morgan Lewis's representation of IBuy with respect to "general corporate matters". However, it does indicate that Morgan Lewis would provide legal services with respect to IBuy's proposed IPO. Although the letter fails to list the hourly rates for the Morgan Lewis attorneys who would be working on the IBuy engagement, it does state that the fees for the IPO would be capped at \$425,000 and explains Morgan Lewis's general billing and expenses practices. Finally, although the letter is silent as to IBuy's potential right to arbitrate fee disputes, the Court notes that disputes involving fees over \$50,000 are not arbitrable. See [22 N.Y.C.R.R. § 137.1\[b\]\[2\]](#). Because the present controversy involves alleged non-payment of fees totaling nearly \$800,000, it would not be subject to fee arbitration. Thus, IBuy has suffered no prejudice as a result of the engagement letter's failure to set forth the required arbitration language.^{FN2} The cross-motion to dismiss the complaint is therefore denied.

[FN2](#). To the extent that [Smart v. Adams, 4 Misc.3d 1026A \(Sup.Ct. Dutchess Cty.2004\)](#) stands for the proposition that a court must disallow legal fees due to an attorney's failure to include the required arbitration language in the engagement letter, this Court declines to follow it.

Morgan Lewis moves for summary judgment on its account stated claim. It is well-settled that the receipt and retention of an invoice without objection within a reasonable period of time may give rise to an account stated claim. [Werner v. Nelkin, 206 A.D.2d 422, 614 N.Y.S.2d 66 \(2d Dept.1994\)](#); [Rockefeller Group, Inc. v. Edwards & Hjorth, 164 A.D.2d 830, 559 N.Y.S.2d 548 \(1st Dept.1990\)](#). However, "[a] key element of a *prima facie* account stated claim is evidence that [the plaintiff] delivered one or more invoices for the amount claimed to defendant, so that he received them." [Commissioners of State Insurance Fund v. Kassas, 5 Misc.3d 1012A \(N.Y.C.Civ.Ct.2004\)](#). Where a plaintiff's evidence fails to establish that the invoices were properly addressed and mailed, there should be no presumption of receipt, and summary judgment on an account stated claim is inappropriate. [Morrison Cohen Singer & Weinstein, LLP v. Brophy, 19 A.D.3d 161, 798 N.Y.S.2d 379 \(1st Dept.2005\)](#); [Citibank \(S.D.\), N.A. v. Martin, 11 Misc.3d 219, 807 N.Y.S.2d 284 \(N.Y.C.Civ.Ct.2005\)](#) (the plaintiff on an account stated claim must show mailing of the account or alternate proof showing the account was received).

Judged by these standards, the Court concludes that Morgan Lewis has failed to meet its *prima facie* showing that it is entitled to summary judgment on its account stated cause of action. Morgan Lewis's claim to summary judgment is supported only by an affidavit of Morgan Lewis partner David J. Sorin. In that affidavit, Sorin states, in conclusory fashion,

that Morgan Lewis submitted periodic invoices to IBuy.^{FN3} There is no evidence submitted, however, of the basis for Sorin's knowledge that the bills were in fact mailed, or any proof that they were mailed on a particular date. Of course, the date of mailing is crucial in determining whether the bills were held for a unreasonable time without objection.^{FN4} Nor is there any *prima facie* showing of a regular office procedure for outgoing mail.

FN3. Sorin also refers to an April 2005 e-mail he purportedly sent to Peter Peterik, IBuy's former Chief Financial Officer. Contrary to Morgan Lewis's contention, this communication does not require the Court to grant summary judgment on the account stated claim. To begin, IBuy's Chief Executive Officer Elliot Antebi has submitted an affidavit stating that he never saw this e-mail, which was not even addressed to him. Moreover, Antebi explains that Peterik had no involvement in IBuy's retention of Morgan Lewis. Most importantly, the-mail is not an invoice (it merely makes reference to previously billed amounts) and does not contain any request for payment.

FN4. Although all of the invoices submitted have dates on the first page, it is not unreasonable to conclude that they were not in fact mailed on those dates in light of Morgan Lewis's agreement to allow IBuy to withhold payment until the consummation of the IPO.

***3** In light of these deficiencies, Morgan Lewis's motion for summary judgment on the account stated claim must be denied. See *Morrison Cohen Singer & Weinstein, LLP v. Brophy*, 19 A.D.3d at 161, 798 N.Y.S.2d 379 (reversing lower court's grant of summary judgment on account stated claim due to the plaintiff's failure to submit evidence of a regular office mailing procedure and the dates when the disputed invoices were allegedly mailed); *Legum v. Ruthen*, 211 A.D.2d 701, 621 N.Y.S.2d 649 (2d Dept.1995)(reversing grant of summary judgment on account stated claim where there was no proof as to the date the bill was submitted); *Commissioners of State Insurance Fund v. Munkacs Car Service Ltd.*, 11 Misc.3d 802, 809 N.Y.S.2d 868 (N.Y.C.Civ.Ct.2006)(dismissing account stated claim after conclusion of the plaintiff's evidence at trial because the plaintiff provided no evidence that the invoices were mailed to the defendant, let alone received); *Commissioners of State Insurance Fund v. Kassas*, 5 Misc.3d at 1012A, 787 N.Y.S.2d 645 (an inadequate showing of transmittal of invoices compels denial of summary judgment on account stated claim); see also *New York & Presbyterian Hospital v. Allstate Insurance Company*, 29 A.D.3d 547, 814 N.Y.S.2d 687 (2d Dept.2006)(summary judgment unwarranted since the affidavit of the plaintiff's principal did not state that he personally mailed the claims nor describe the office mailing practice or procedures); *Response Medical Equipment v. General Assurance Company*, 13 Misc.3d 129A (App. Term 1st Dept.2006)(same); cf. *Ruskin, Moscou, Evans, & Faltischek, P.C. v. FGH Realty Credit Corp.*, 228 A.D.2d 294, 644 N.Y.S.2d 206 (1st Dept.1996)(granting summary judgment on account stated based on *prima facie* showing that defendant actually received the bills in question).

Even if the Court were to accept Sorin's vague affidavit as proof of mailing, there is a disputed issue of fact because IBuy's Chief Executive Officer Elliot Antebi, to whom the invoices were allegedly sent, has submitted an affidavit stating that he never received any of the invoices. In its reply papers, Morgan Lewis attempts to remedy its failure to set forth a *prima facie* showing by submitting affidavits from several office workers at Morgan Lewis explaining the firm's invoice mailing procedures. However, it is well-settled that a plaintiff seeking summary judgment may not cure its failure to establish a *prima facie* case by submitting the missing evidence by way of reply. Thus, the Court cannot consider these reply submissions.^{FN5} See *Batista v. Santiago*, 25 A.D.3d 326, 807 N.Y.S.2d 340 (1st Dept.2006)(to meet its *prima facie* burden, summary judgment movant could not rely on evidence submitted for the first time in its reply papers); *Rengifo v. City of New York*, 7 A.D.3d 773, 776 N.Y.S.2d 865 (2d Dept.2004)(same); *Migdol v. City of New York*, 291 A.D.2d 201, 737 N.Y.S.2d 78 (1st Dept.2002)(same);

[Power Cooling, Inc. v. Wassong, 5 Misc.3d 22, 783 N.Y.S.2d 741 \(App. Term 1st Dept.2004\)](#)(same); *Chase Manhattan Bank v. New Hampshire Insurance Company*, 4 Misc.3d 1026A (Sup.Ct. N.Y. Cty.2004)(same).

FN5. For the same reason, the Court cannot consider the affidavit of Morgan Lewis's Director of Collections.

***4** This case is strikingly similar to *Reliable Medical Services, P .C. v. Travelers Indemnity Company*, 12 Misc.3d 147A (App. Term 1st Dept.2006). In that case, the court denied the defendant's cross-motion for summary judgment on an insurance payment claim because "the affidavit of [the] defendant's representative, submitted to establish proof of mailing of the verification requests, neither stated that she personally mailed the requests nor described [the] defendant's mailing office and procedures." [12 Misc.3d at 147A, 820 N.Y.S.2d 676](#). The Court then went on to reject the defendant's attempt to remedy the deficiency by submitting proof of mailing in a reply affidavit. *See also Mid Atlantic Medical, P.C. v. Travelers Indemnity Company*, 12 Misc.3d 147A (App. Term 1st Dept.2006)(same). Similarly, Morgan Lewis's submission of its reply affidavits cannot cure its failure to have submitted them in its original motion papers. *See Abramson v. Hertz, 19 A.D.3d 305, 798 N.Y.S.2d 20 (1st Dept.2005)*(the plaintiff failed to adduce evidence sufficient to make out a *prima facie* entitlement to attorneys' fees on an account stated theory, and the invoices submitted for the first time in reply papers were properly disregarded by the lower court).

Even if the Court were to consider the affidavits of the Morgan Lewis employees, it would nevertheless deny the motion for summary judgment as premature, since no discovery has yet taken place. In [Nassau Insurance Company v. Murray, 46 N.Y.2d 828, 414 N.Y.S.2d 117, 386 N.E.2d 1085 \(1978\)](#), the court held that where proof shows that a certain office mailing procedure was followed, a presumption arises that the mailed items were received. Although denial of receipt alone is insufficient to rebut that presumption, the alleged recipient of the items can rebut the presumption by showing that "routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed." 46 N.Y.2d at 830. Here, since Morgan Lewis's office procedures were first described in its reply papers, IBuy has not had the chance to respond. Nor has IBuy had the opportunity to take discovery on Morgan Lewis's routine office practices which could allow it to rebut the presumption of mailing. Such discovery could be critical here especially in light of the claims of the Morgan Lewis employees that they specifically remember sending these particular invoices in question to IBuy. At the very least, IBuy should have the opportunity in discovery to question why a billing assistant would remember these particular bills given the large size of Morgan Lewis and the length of time that has passed since the bills were purportedly mailed. In sum, Morgan Lewis's motion for summary judgment on the account stated claim should be denied.

In its complaint, Morgan Lewis seeks legal fees of \$592,913.50 in connection with its work on the IPO and \$177,841.50 for services relating to other matters. IBuy cross-moves to dismiss the complaint to the extent that: (1) Morgan Lewis seeks fees relating to the IPO that exceed the \$425,000 fee cap set forth in the engagement letter; and (2) Morgan Lewis seeks fees for work unrelated to the IPO. As noted above, the engagement letter provides that "[n]otwithstanding anything in this letter to the contrary, [Morgan Lewis's] fee for services in connection with the proposed IPO will not be more than \$425,000, plus disbursements, if any, made by [Morgan Lewis] on [IBuy's] behalf." Although this language appears to be absolute and unequivocal, Morgan Lewis argues that at the time the engagement was entered into, IBuy withheld critical information bearing upon the amount of work that would be involved in the IPO. In addition, Morgan Lewis submits evidence showing that IBuy was informed several times that the work on the IPO would exceed the fee cap and that IBuy lodged no objections. Under these

circumstances, there is a potential issue of fact as to whether IBuy's silence constituted an acquiescence to the excess fees and a modification of the original agreement. At the very least, Morgan Lewis is entitled to discovery on these issues. The Court, at this early stage in the litigation, cannot conclude as a matter of law that Morgan Lewis's damages relating to fees for the IPO should be limited to \$425,000.

*5 Likewise, the Court cannot conclude as a matter of law that Morgan Lewis is not entitled to its legal fees for services relating to other matters purportedly unconnected to the IPO. First, the engagement letter states that Morgan Lewis would provide IBuy with legal services for both the IPO and "general corporate matters". Moreover, Morgan Lewis has submitted invoices purportedly sent to, and retained without objection by, IBuy clearly showing charges for legal work unrelated to the IPO. In light of this evidence and the fact that no discovery has taken place, the Court cannot say that Morgan Lewis is barred as a matter of law from collecting fees for work unrelated to the IPO. Thus, the Court denies IBuy's cross-motion to dismiss Morgan Lewis's claims for legal fees for matters unrelated to the IPO.^{FN6}

FN6. In light of this conclusion, the Court need not reach Morgan Lewis's alternative argument that the cross-motion is untimely or barred by equitable estoppel.

IBuy cross-moves to dismiss Morgan Lewis's cause of action for *quantum meruit* on the grounds that a valid and enforceable contract exists between the parties.^{FN7} It is true that in general, a claim for *quantum meruit* cannot be maintained where a contract spells out the terms of the parties' agreement. *Clark-Fitzpatrick, Inc. v. Long Island Railroad Company*, 70 N.Y.2d 382, 521 N.Y.S.2d 653, 516 N.E.2d 190 (1987). However, where there is a " *bona fide* dispute" as to whether the contract covers the dispute in issue, "[a] plaintiff may proceed upon a theory of *quantum meruit* and will not be required to elect his or her remedies." *IIG Capital LLC v. Archipelago, L.L.C.*, --- AD3d ----, 2007 N.Y.App. Div. LEXIS 45 (1st Dept. January 4, 2007). Here, the parties vigorously argue over whether the engagement letter was meant to cover work on general corporate matters unrelated to the IPO. In light of this dispute and the early stage of this litigation, the Court cannot conclude that the *quantum meruit* claim should be dismissed. Thus, IBuy's cross-motion to dismiss this cause of action is denied.

FN7. In its reply papers, IBuy puts forth an entirely different argument as to why the *quantum meruit* claim should be dismissed on the grounds that it is not properly pleaded. However, this argument was not raised in the initial cross-motion papers and cannot be considered by the Court.

In its answer, IBuy asserts counterclaims for legal malpractice, breach of contract, breach of fiduciary duty, fraud and fraudulent inducement. Morgan Lewis moves to dismiss all of the counterclaims in their entirety. To properly plead a cause of action for legal malpractice, a plaintiff must allege facts showing: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff's losses; and (3) proof of actual damages. *Brooks v. Lewin*, 21 A.D.3d 731, 800 N.Y.S.2d 695 (1st Dept.2005). With regard to the element of causation, the factual allegations in the complaint must "permit the inference that, but for [the] defendants' [alleged negligence], [the] plaintiff would not have sustained actual, ascertainable damages". *Pyne v. Block & Assocs.*, 305 A.D.2d 213, 760 N.Y.S.2d 30 (1st Dept.2003). In other words, "the client must demonstrate his or her own likelihood of success; absent such a showing, counsel's conduct is not the proximate cause of the injury." *Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 A.D.2d 63, 67, 750 N.Y.S.2d 277 (1st Dept.2002).

*6 Applying these principles, the Court dismisses the counterclaim alleging legal malpractice. IBuy's entire theory of loss in this action is that its planned IPO failed to

materialize as a result of Morgan Lewis's alleged negligence in handling the matter. However, IBuy has utterly failed to set forth any facts that would support an inference that but for Morgan Lewis's alleged negligence, IBuy's IPO would likely have succeeded. Neither the answer nor IBuy's supporting affidavit contains any specific facts regarding market conditions, IBuy's viability in the marketplace, IBuy's financing prospects or any other fact that could show that IBuy was in a position to successfully consummate the IPO.

Instead, IBuy makes the vague and conclusory assertions that unspecified market conditions led it to decide to go public and that the IPO would have been completed but for Morgan Lewis's malpractice. Such conclusory allegations of causation, however, are insufficient to withstand a motion to dismiss a cause of action for legal malpractice. See, e.g., [McLoughlin v. Sullivan Papain Block McGrath & Connavo, P.C.](#), 18 A.D.3d 245, 793 N.Y.S.2d 911 (1st Dept.2005) (dismissing malpractice claim where complaint failed to set forth nonconclusory factual allegations of causation); [Gall v. Summit, Rovins & Feldesman](#), 222 A.D.2d 225, 635 N.Y.S.2d 17 (1st Dept.1995) (cause of action for legal malpractice failed to state a claim because the complaint was "devoid of factual allegations which sufficiently demonstrate a causal relationship between purported conduct on the part of [the] defendants and damages suffered by [the] plaintiff").^{FN8}

^{FN8}. Although the complaint states that IBuy had "anticipated" a profitable third and fourth quarter when it entered into the engagement letter, it does not assert that IBuy did in fact have a profitable period or that such profitability would have caused the IPO to happen but for the alleged malpractice. Nor does IBuy's submission of unauthenticated copies of articles purportedly found on the Internet cure its pleading deficiencies.

In its breach of contract counterclaim, IBuy claims that Morgan Lewis breached the engagement letter in numerous ways. First, IBuy contends that Morgan Lewis's failure to complete the IPO by March 2005 constitutes a breach of contract. However, no promise is made in the letter that the IPO would be completed by any particular date. Indeed, the terms of the letter make clear that the parties accounted for the possibility that the IPO would *not* be completed by March 2005. See Engagement Letter, p. 1 ("if the IPO transaction is not consummated by March 2005, we will work out with you a plan to pay the outstanding fees over a several-month period"). IBuy also alleges that Morgan Lewis breached the engagement letter by charging fees above the purported fee cap, falsifying time records and charging for services unrelated to the IPO. However, since IBuy does not allege that it paid any of Morgan Lewis's fees, it has not established that it suffered any damages as a result of this claimed breach.^{FN9} As discussed *infra*, IBuy may raise these allegations in connection with its affirmative defenses.

^{FN9}. There is no dispute that the fees were not paid. Indeed, IBuy denies that it received any of the invoices.

IBuy also asserts that Morgan Lewis breached the engagement letter by "failing to exercise the degree of skill commonly exercised by an ordinary member of the legal community" and "failing to act in IBuy's best interest in handling the IPO." See Answer, p. 12. These allegations, however, are merely duplicative of a malpractice counterclaim and do not support an independent cause of action for breach of contract. See, e.g., [Ferdinand v. Crecca & Blair](#), 5 A.D.3d 538, 774 N.Y.S.2d 714 (2d Dept.2004) (breach of contract claim premised on an attorney's failure to exercise due care or abide by general professional standards dismissed as duplicative); [Sage Realty Corp. v. Proskauer Rose, LLP](#), 251 A.D.2d 35, 675 N.Y.S.2d 14 (1st Dept.1998) (same).

*7 The Court sustains the breach of contract counterclaim only to the extent that it alleges that Morgan Lewis breached its promise that Morgan Lewis partner David J. Sorin

would “personally lead the IPO”. See Engagement Letter, p. 1. Contrary to Morgan Lewis's contention, this allegation is not duplicative of the malpractice counterclaim but stands as a separate independent breach of an express promise made in the engagement letter. Morgan Lewis's submission of invoices showing that Sorin put many hours into the matter simply raises an issue of fact and provides no basis to dismiss this aspect of the counterclaim.

IBuy's third counterclaim alleges that Morgan Lewis breached its fiduciary duty by knowingly breaching the engagement letter and by failing to ensure Sorin's personal involvement in the IPO process. However, these allegations are duplicative of the breach of contract claim sustained by the Court and cannot support a separate breach of fiduciary duty claim. See [William Kaufman Organization, Ltd. v. Graham & James LLP, 269 A.D.2d 171, 703 N.Y.S.2d 439 \(1st Dept.2000\)](#) (“[a] cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand”). IBuy also alleges that Morgan Lewis breached its fiduciary duty by falsifying time records. However, as noted above, in light of the fact that IBuy never paid any of Morgan Lewis's bills, IBuy has failed to allege any damages arising from this purported breach. To the extent that the breach of fiduciary claim asserts that Morgan Lewis negligently handled the IPO, it is dismissed for failing to allege facts showing that but for Morgan Lewis's alleged breach, IBuy's IPO would likely have succeeded. See [Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267, 780 N.Y.S.2d 593 \(1st Dept.2004\)](#) (“but for” standard of causation applies to claims for breach of fiduciary duty in the context of attorney liability).

IBuy asserts that Morgan Lewis fraudulently induced it into entering the engagement letter by stating that Sorin would be personally involved in handling the IPO, that the fees would be capped at \$425,000, that the IPO would be consummated by March 2005 and that the legal fees charged would be limited to work on the IPO. These allegations fail to state a fraud claim “because they rel[y] upon alleged misrepresentations of future intent.” [Glenn Partition, Inc. v. Teachers of Columbia University in the City of New York, 169 A.D.2d 488, 489, 564 N.Y.S.2d 361 \(1st Dept.1991\)](#). “Absent a present intention to deceive, a statement of future intentions, promises or expectations is not actionable on the grounds of fraud. A complaint based upon a statement of future intention must allege facts to show that the defendant, at the time the promissory representation was made, never intended to honor or act on his statement”. [Non-Linear Trading Co. v. Braddis Associates, 243 A.D.2d 107, 675 N.Y.S.2d 5 \(1st Dept.1998\)](#). Since the complaint is devoid of any facts showing that, at the time the alleged statements were made, Morgan Lewis never intended to honor them, the claim for fraudulent inducement must be dismissed. See [Manhattan Film, Inc. v. Entertainment Guarantees, Ltd., 156 A.D.2d 152, 548 N.Y.S.2d 200 \(1st Dept.1989\)](#) (cause of action for fraudulent inducement cannot be based solely upon a failure to perform contractual promises of future acts). For the same reasons, the Court dismisses the counterclaim alleging fraud. To the extent the fraud counterclaim complains about improper billing, IBuy has failed to show any damages in light of its failure to have paid the bills.

***8** Morgan Lewis moves to dismiss all of IBuy's affirmative defenses. Since IBuy offers no opposition to dismissal of the first, second, sixteenth and seventeenth affirmative defenses, they are dismissed. The sixth affirmative defense based on [Judiciary Law § 487](#) is also dismissed. “[T]he statute has no application here, since the wrongful conduct asserted by plaintiffs occurred either when there was no longer a pending judicial proceeding or before such a proceeding commenced.” [Stanski v. Ezersky, 228 A.D.2d 311, 644 N.Y.S.2d 220\(1st Dept. 1996\)](#). In light of the dismissal of the malpractice counterclaim, the fifth affirmative defense of malpractice is dismissed as well.

The Court denies the motion to dismiss the third and twelfth affirmative defenses alleging that Morgan Lewis's claims are barred by the engagement letter and due to Morgan

Lewis's failure to perform. These defenses are relevant to, *inter alia*, IBuy's claim that Morgan Lewis violated the fee cap and charged for services unrelated to the IPO. Likewise, Morgan Lewis has failed to show, at this early stage, how the tenth, eleventh, thirteenth, fourteenth and fifteenth affirmative defenses do not state defenses to the causes of action in the complaint. The Court also sustains the eighth and ninth affirmative defenses alleging fraud and bad faith based, *inter alia*, on IBuy's allegations of fraudulent billing.

The Court denies the motion to dismiss the fourth and seventh affirmative defenses asserting violation of [22 N.Y.C.R.R. § 1215.1](#) and illegality of the engagement letter. Although the Court declined to dismiss the complaint on this basis, an attorney's failure to comply with the regulation can be relevant to what penalty, if any, should be assessed against the non-compliant attorney. See *In re Estate of Feroletto*, 6 Misc.3d at 680, 791 N.Y.S.2d 809 (in light of attorney's failure to comply with [§ 1215.1](#), court could resolve any misunderstanding arising from such non-compliance in favor of the client). Thus, dismissal of these defenses at this stage would not be appropriate.

For the reasons stated above, the Court dismisses IBuy's demand for treble damages pursuant to [Judiciary Law § 487](#). IBuy does not oppose Morgan Lewis's motion to dismiss the punitive damages demand and thus it is dismissed. Accordingly, it is

ORDERED that Morgan Lewis's motion for summary judgment on the account stated claim is denied; and it is further

ORDERED that Morgan Lewis's motion to dismiss IBuy's counterclaims, affirmative defenses and demands for treble and punitive damages is granted in part and denied in part as indicated above; and it is further

ORDERED that IBuy's cross-motion to dismiss the complaint or, in the alternative, to dismiss the *quantum meruit* cause of action is denied; and it is further

ORDERED that IBuy's cross-motion to dismiss certain elements of Morgan Lewis's damages claim is denied.

This constitutes the decision and order of the Court

N.Y.Sup., 2007.

Morgan, Lewis & Bockius LLP v. IBuyDigital.com, Inc.

Slip Copy, 14 Misc.3d 1224(A), 2007 WL 258305 (Table) (N.Y.Sup.), 2007 N.Y. Slip Op. 50149(U)